Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

LIZABETH URIBE,

Petitioner

vs.

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a partnership; KAISER FOUNDATION HEALTH PLAN, INC., a Corporation, KATHY SMITH, an individual, JEFFREY SHULKIN, an individual, RAMAH BALIBER, an individual, CAROLYN E. GOMEZ, an individual and DOES 1 through 20 inclusive,

Respondents

On a Writ of Certiorari to
The Court of Appeal of the State of California for the Second Appellate District, Division Five

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The instant PETITION raises the following questions of law which require review by this Court:

(1)

Can state courts give greater preclusive effect to a judgment or order than the Federal Court which made and entered the judgment or order in the first instance?

(2)

Is a litigant in an action brought in a Federal Court obligated to amend or supplement his or her pleadings during the action's pendency in the federal courts in order to preserve claims based upon facts which occur after the filing of his or her complaint in the federal courts?

(3)

Can state courts deny a party to an action pending in the federal courts the right to pursue claims under state law which arise during the pendency of his or her federal action?

## CONSTITUTIONAL AND STATUTORY PROVISIONS[1]

The issues discussed in this PETITION arise under the following laws, statutes, and constitutional provisions:

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE III §§ 1 and 2 clause 1

Section 1 of ARTICLE IV

Section 2 of ARTICLE IV

ARTICLE VI clause 2

The Fifth Amendment

Section 1 of The Fourteenth Amendment

THE UNITED STATES CODE

28 U.S.C § 1257

28 U.S.C. § 1738

29 U.S.C. § 185

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[1] The constitutional and statutory provisions involved in the case are set out in full in APPENDIX "J".

42 U.S.C. § 12101

42 U.S.C. § 12102(2)(A)

THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 15(d)

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Government Code § 12965

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Respondents[2]

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[2]. All parties to these proceedings are listed in the caption of the case as required under Rule 24 1.(b) of the Rules of the Supreme Court of the United States. When the term "RESPONDENTS" is used in the body of this PETITION it refers to all of the DEFENDANTS in the state court litigation, when the term RESPONDENT is used singularly it refers to the employing entity "SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP" (the principal DEFENDANT in both PETITIONER'S state and federal litigation).

## PETITION FOR WRIT OF CERTIORARI

COMES NOW PETITIONER LIZABETH URIBE and prays that a Writ of Certiorari be issued pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States to the California Court of Appeal for the Second Appellate District, Division 5 (hereinafter "THE CALIFORNIA COURT OF APPEAL") in order to review the decision rendered by that Court on August 9, 1999 (APPENDIX "A"[3]) denying PETITIONER'S appeal from the order (APPENDIX "F") and judgment[4] dismissing the complaint which she filed in the Superior Court of the State of California for the County of Los Angeles on December 31, 1997 under the provisions of the disability provisions of California's Fair Employment & Housing Act (California Government Code §§ 12900 et seq. (a copy of which is included in APPENDIX "D" and hereinafter referred to as "STATE COMPLAINT").

This Petition is filed on the grounds that the decision of THE CALIFORNIA COURT OF APPEAL (APPENDIX

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[3]. In order to conform with the page size requirements of Rule 33(c) of the Rules of the Supreme Court of the United States all documents reproduced in the APPENDIXES have been optically scanned and reformatted so that they comply with the font requirements set forth in Rule 33(b) of the Rules of the Supreme Court of the United States.

[4]. A judgment was entered on December 30, 1998 pursuant to the terms of the order directing the dismissal of PETITIONER'S STATE COMPLAINT (APPENDIX "F").

"A") concerning the *res judicata* effect of the order by United States District Judge LOURDES G. BAIRD entered in the United States District Court for the Central District of California on June 26, 1998 (APPENDIX "B" and hereinafter referred to as "THE FEDERAL COURT ORDER")[5] is inconsistent and in direct conflict with decisions of Federal Circuit Courts which the California Court refused to consider in violation of ARTICLE VI clause 2 of the Constitution of the United States of America[6].

In upholding the dismissal of PETITIONER'S STATE COMPLAINT THE CALIFORNIA COURT OF APPEAL held that even though the district court's June 26, 1998 decision (hereinafter "THE FEDERAL ORDER") would not have precluded the filing of her post filing state claims under federal common law [see Kremer v. Chemical

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[5]. A judgment was entered in the United States District Court for the Central District of California on June 26, 1998 in accordance with the provisions of THE FEDERAL ORDER.

[6]. Because the effect of a federal order or judgment upon a litigant is a matter of federal law, a state court does not have jurisdiction under Article VI clause 2 of the Constitution of the United States to ignore federal law when determining the effect of the order or judgment. As this Court held in Louisville & Nashville Rv. Co. v. Mottley 211 U.S. 149, 151-152, 29 S.Ct. 42, 43 (1908) it has a duty to make sure that the limits which are imposed upon the jurisdiction of lower courts are not exceeded. This independent duty to review the decision of the lower courts arises even when not raised by the parties. [see also City of Kenosha v. Bruno 412 U.S. 507, 511, 93 S.Ct. 2222, 2225 (1973)(reversed on other grounds); Preblich v. Battley 181 F.3d. 1048, 1054 (9th Cir. 1999)]

Construction Corp. 456 U.S. 461, 481-482, 102 S.Ct. 1883, 1898 (1982); Migra v. Warren City School District Board of Education 465 U.S. 75, 104 S.Ct. 892, 897-98, 79 L.Ed.2d 56 (1984); Clark v. Yosemite Community College District 785 F.2d 781, 783 (9th Cir. 1986) and Securities and Exchange Commission v. First Jersey Securities, Inc. 101 F.3d. 1450 (Second Cir. 1996)], state courts in California may apply a different standard to the determination of what constituted a cause of action and therefore are not bound to follow federal law in determining the preclusive effect of a judgment or order entered in a federal court (see APPENDIX "A" pages APX 8 through APX 9 inclusive).

## THE STATE COURT OPINION UPON WHICH CERTIORARI IS SOUGHT

The decision of THE CALIFORNIA COURT OF APPEAL (APPENDIX "A") for which review by certiorari is sought upheld the dismissal (APPENDIX "F") of the complaint filed by PETITIONER in the state court (APPENDIX "D" and hereinafter referred to as "STATE COMPLAINT") based upon the *res judicata* and preclusive effect of THE FEDERAL ORDER (APPENDIX "B").

PETITIONER'S STATE COMPLAINT (APPENDIX "D") was filed under California's Fair Employment and Housing Act [California Government Code § 12900 et seq. (specifically Government Code § 12940(k)) which is hereinafter collectively referred to as "FEHA"] as a result of conduct which occurred after the January 21, 1997 filing of PETITIONER'S FEDERAL COMPLAINT.

PETITIONER'S STATE COMPLAINT (APPENDIX "D") was filed on December 31, 1997 [based upon a right to sue letter issued by the California Department of Fair Employment and Housing (hereinafter referred to as "DFEH") on November 20, 1997 pursuant to California Government Code § 12965(b)].

PETITIONER'S STATE COMPLAINT sought relief under FEHA as a result of conduct which occurred after the January 21, 1997 filing of her complaint in the United States District Court for the Central District of California (hereinafter referred to as "FEDERAL COMPLAINT" and

included as APPENDIX "E"), and particularly conduct occurring in 1997 which RESPONDENTS used to justify their thirty (30) day suspension of PETITIONER which occurred in October and November of 1997.

The CALIFORNIA COURT OF APPEAL'S unpublished opinion [APPENDIX "A"] was filed on August 9, 1999. PETITIONER filed a petition for rehearing to THE CALIFORNIA COURT OF APPEAL based upon the decision's rejection of federal law (a position which neither party had raised or discussed in either their briefs or during the course of oral arguments). PETITIONER'S petition for rehearing was timely filed on August 23, 1999 and denied without comment by order dated August 24, 1999 [APPENDIX "G"]. On September 10, 1999 PETITIONER petitioned THE CALIFORNIA SUPREME COURT for Review of THE CALIFORNIA COURT OF APPEAL'S August 9, 1999 decision. PETITIONER'S Petition for Review by the California Supreme Court was denied by ordered entered on October 20, 1999 [included in APPENDIX "H"][7].

THE CALIFORNIA COURT OF APPEAL issued remittitur on December 22, 1999 [APPENDIX "I"].

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[7]. PETITIONER has calculated the ninety (90) day period referred to in Rule 13.1. of the Rules of the Supreme Court of the United States from the October 20, 1999 denial of review by the California Supreme Court. Based upon that calculation the last day for filing this PETITION is January 18, 2000.

## ORDER & JUDGMENT IN PETITIONER'S FEDERAL LITIGATION FILED ON JANUARY 21, 1997

On January 21, 1997 PETITIONER (a wheelchair-bound licensed cytotechnologist[8]) filed her FEDERAL COMPLAINT (through union counsel) seeking relief under the Americans With Disabilities Act (42 U.S.C. § 12101 et seq. hereinafter referred to as "THE ADA") and the Labor Management Relations Act of 1947 (29 U.S.C. § 185 hereinafter referred to as "LMRA") through union counsel.

After the January 21, 1997 filing of PETITIONER'S FEDERAL COMPLAINT her union counsel entered into a stipulation with counsel for her employer (who were joined as DEFENDANTS in her STATE COMPLAINT and designated as RESPONDENTS herein) under which all of the claims raised in her FEDERAL COMPLAINT were referred to arbitration under a collective bargaining agreement between her union and employers. The arbitration hearing in the federal litigation brought by her union occurred on October 27 and 31, 1997 (APPENDIX "C" page APX. 27).

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[8]. As the arbitrator found in the opinion confirmed by the District Court:

> Despite her Physical handicap, [PETITIONER] remains fully able, with or without reasonable accommodation, to perform all the essential functions of her position as she has over the past 18 years. (APPENDIX "C" page APX. 35)

On March 9, 1999 the arbitrator in PETITIONER'S federal action rendered an opinion and made an award under the provisions of LMRA and the collective bargaining agreement (APPENDIX "C").

On June 26, 1998 DISTRICT JUDGE BAIRD entered an order in the United States District Court for the Central District of California confirming the Arbitrator's March 9, 1998 award and ordered judgment entered in conformity with it (APPENDIX "B" which is hereinafter referred to as "THE FEDERAL ORDER"). Because DISTRICT JUDGE BAIRD determined that the confirmation of the Arbitrator's award made the closing of the federal litigation appropriate, she held that PETITIONER could not amend her FEDERAL COMPLAINT to include claims which arose during the pendency of her federal action, although she observed in footnote 5 of her order (APPENDIX "B" page APX 25) that:

> . . . [P]etitioner could, of course, file a new complaint alleging any wrongdoing not covered by the arbitration[9].

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[9]. A judgment, incorporating the terms of arbitrator's award, was entered the same day. An appeal from the portion of the order entered on June 26, 1998 which denied leave to amend was not appropriate because DISTRICT JUDGE BAIRD'S decision not to expand the issues was within her discretion under Rule 15(d) of the Federal Rules of Civil Procedure. Under the circumstances the correct procedure for PETITIONER to pursue in connection with her post filing claims was to either file a new complaint in the district court, or continue with the state court litigation which is the subject matter of this petition.

## JURISDICTION

This Court's jurisdiction is based upon 28 U.S.C § 1257 and Rules 10(b) and 10(c) of the Rules of the Supreme Court of the United States as a result of the decision of the state courts of California dismissing her STATE COMPLAINT based upon PETITIONER's failure to adjudicate claims based upon events which occurred after she had filed an earlier FEDERAL COMPLAINT in the United States District Court for the Central District of California.

This Court also has independent jurisdiction under sections 1 and 2 of ARTICLE III of the Constitution of the United States of America to determine whether state court judges have exceeded the limits imposed upon them under ARTICLE VI clause 2 of the Constitution of the United States of America. (see discussion footnote 6 supra).

## BALANCING THE JURISDICTION OF STATE AND FEDERAL COURTS UNDER THE SUPREMACY CLAUSE CONTAINED IN ARTICLE VI

The issues raised in this PETITION arise because [as set forth in footnote 5 to DISTRICT JUDGE BAIRD'S order entered on June 26, 1998 (APPENDIX "B" page APX. 25)] while PETITIONER had the right to pursue claims which arose after the filing of her FEDERAL COMPLAINT in the federal courts, the California Superior Court order dismissing her STATE COMPLAINT and the August 9, 1999 Decision of THE CALIFORNIA COURT OF APPEAL held she did not have the right to pursue those claims in the courts of California because of the *res judicata* effect of THE FEDERAL ORDER under California law.

PETITIONER maintains the position that a state court cannot constitutionally abridge (under ARTICLE IV § 2 and section 1 of the Fourteenth Amendment) the rights of any citizen of the United States who fails to take actions in a federal court which he or she is not obligated to pursue under federal law, or impose sanctions against a federal litigant making appropriate elections under the Federal Rules of Civil Procedure [(Rule 15(d)].

Under ARTICLE IV § 2, ARTICLE VI clause 2 and the equal protection provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States of America a state court does not have the jurisdiction to redefine the effect of a discretionary pleading motion under the provisions of the federal law.

## MANNER IN WHICH FEDERAL QUESTIONS WERE FIRST RAISED IN THE STATE COURT

The issue of PETITIONER'S right to pursue claims based upon events which took place after her January 21, 1997 filing in the Federal Courts was first raised in response to RESPONDENTS' motion to dismiss her STATE COMPLAINT which was filed in the Superior Court of the State of California for the County of Los Angeles. RESPONDENTS' motion, based upon the *res judicata* and preclusive effect of THE FEDERAL ORDER was granted following a hearing held in the Superior Court on September 24, 1998 (APPENDIX "F")[10].

The dismissal of PETITIONER'S STATE COMPLAINT was appealed to THE CALIFORNIA COURT OF APPEAL which upheld the Superior Court's dismissal in its August 9, 1999 decision (APPENDIX "A").

In briefs filed by PETITIONER in opposition to RESPONDENTS' motion and in support of her appeal she argued [citing S. E. C. v. First Jersey Securities, Inc. 101 F. 3d 1450 (2d Cir. 1996) and Clark v. Bear Stearns & Co., Inc. 966 F. 2d 1318 (9th Cir. 1992)] that *res judicata* could not be applied under federal common law to give THE FEDERAL ORDER (and the judgment which followed) a preclusive effect on claims based upon events which occurred *after* the filing of her FEDERAL COMPLAINT.

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[10]. Judgment was entered pursuant to the terms of the order on December 30, 1998.

In response to PETITIONER'S federal citations THE CALIFORNIA COURT OF APPEAL observed:

> [PETITIONER] relies on federal cases which hold that where a defendant engages in actionable conduct after a lawsuit is filed, a plaintiff may, but need not, file a supplemental complaint, and also hold that the doctrine of *res judicata* will not be used to punish a plaintiff who does not file such a complaint. (citations omitted)
>
> Those cases are of no assistance to us. The cited holding is based on the federal courts' use of a transactional analysis for defining "cause of action" for purposes of *res judicata*.

THE CALIFORNIA COURT OF APPEAL decision violates ARTICLE VI clause 2 of the Constitution of the United States of America which establishes the Laws of the United States as the supreme law of the land and provides:

> . . . the Judges of every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding[11].

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[11]. The language of Article VI appears to create a jurisdictional impediment to the rejection of federal law by a state court in a situation in which federal rule making is appropriate. (cf California Court of Appeal decision in APPENDIX "A" page APX 7 through APX 8). The effect of that restriction on a state court's jurisdiction is to give this Court jurisdiction to enforce the constitutional limit.

**PETITIONER initially raised her equal protection argument under the Fourteenth Amendment in her REPLY BRIEF filed with THE CALIFORNIA COURT OF APPEAL on February 16, 1999. PETITIONER'S Due Process argument was rejected by THE CALIFORNIA COURT OF APPEAL in its August 9, 1999 decision. As set forth in the concluding paragraph of THE COURT OF APPEAL'S August 9, 1999 decision the Court saw:**

> **. . . no violation of constitutional guarantees of equal protection in the application of principles of *res judicata* to this case. (see APPENDIX "A" at pages APX. 11-12 inclusive)**

**The choice of law issues relating to PETITIONER'S argument that federal law should determine the *res judicata* effect of a federal judgment in a state court was not raised until THE CALIFORNIA COURT APPEAL rejected any reference to federal law in its August 9, 1999 decision (APPENDIX "A" at page APX. 7). In response to the CALIFORNIA COURT OF APPEAL'S rejection of federal case law on the choice of law issue (which neither party had been given a chance to fully brief) PETITIONER filed a request for rehearing on August 23, 1999, which the Court summarily denied on August 24, 1999 (see APPENDIX "G").**

## PETITIONER'S STATUS AS A DISABLED PERSON ENTITLED TO PROTECTION

**As set forth in THE ADA:**

> **[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society; [42 U.S.C. § 12101(a)(7)] (cf footnote 8 supra)**

**As set forth in THE ADA one of the purposes Congress intended to achieve was:**

> **[T]o provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities (42 U.S.C. § 12101(b)(2)).**

**It is undisputed that PETITIONER is a disabled person under the definitions of "disability" contained in both FEHA [Government Code § 12926(k)] and THE ADA [42 U.S.C. § 12102(2)] and competent to perform the functions of a cytotechnologist (see APPENDIX "C" at page APX 35).**

## REASONS FOR GRANTING WRIT

This PETITION should be granted because it raises important issues concerning the rights of federal litigants to protection under state law (including the disability provisions of FEHA) while they are pursuing claims under federal law in the Federal Courts.

The importance of the issues raised by this PETITION is highlighted by the fact that the rights which PETITIONER is seeking to protect in the courts of California were defeated solely because THE CALIFORNIA COURT OF APPEAL refused to given any consideration to federal law in violation of ARTICLE VI clause 2. In doing so THE CALIFORNIA COURT OF APPEAL denied PETITIONER the benefits of the disability provisions of FEHA (Government Code § 12940(k)] during the pendency of a suit brought on her behalf in the federal courts by her union under THE ADA.

The public policies related to the protection of competent disabled workers is an important part of a congressional mandate contained in THE ADA. Those policies (embodied in 42 U.S.C. § 12101) recognize the need to provide competent disabled persons (such as PETITIONER) with continuing protection. A resolution of the issues raised by this PETITION is therefore necessary in order to assure disabled persons that their rights will not abridged while pursuing claims in the federal courts.

## FACTUAL BACKGROUND OF CLAIMS FOR RELIEF

PETITIONER filed her FEDERAL COMPLAINT on January 21, 1997 seeking relief under THE ADA and THE LMRA (APPENDIX "E").

The FEDERAL COMPLAINT, which was filed on behalf of PETITIONER and her union (see APPENDIX "E") did not seek relief under state law or damages for anything other than lost wages under a collective bargain agreement between her Union and her employer[12].

After the filing of the FEDERAL COMPLAINT PETITIONER has alleged that RESPONDENTS continued to subject her to a pattern of discriminatory conduct which culminated with her suspension in October and November of 1997 from the position she held as a cytotechnologist in RESPONDENTS' North Hollywood Laboratory[13].

Based upon RESPONDENTS' post filing conduct (which included a punitive suspension in October and November of 1997) PETITIONER filed a new complaint of Discrimination against RESPONDENTS with the California

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[12]. The resolution of PETITIONER'S claims in the FEDERAL COMPLAINT through arbitration made no provisions for any relief beyond that provided for under the provisions of THE LMRA and the collective bargaining agreement between RESPONDENTS and PETITIONER'S union. (see APPENDIX "C").

[13]. PETITIONER'S competency and ability to perform her professional functions has never been an issue.

Department of Fair Employment and Housing (hereinafter referred to as "DFEH") in late November of 1997. Following the issuance of a right to sue letter by DFEH PETITIONER filed her STATE COMPLAINT in the Superior Court of the State of California for the County of Los Angeles on December 31, 1997 (APPENDIX "D").

As District Judge BAIRD subsequently observed in her order filed on June 26, 1998 the STATE COMPLAINT (which sought only relief under California law (and made no claims under either the ADA or LMRA) differed in four regards from the FEDERAL COMPLAINT:

> 1) it names several individual Kaiser employees as defendants in addition to Kaiser; 2) it is based exclusively on FEHA, rather than on the ADA and LMRA; 3) it alleges harassment and retaliation as well as discrimination; and 4) *it alleges certain conduct occurring later in time than the federal Complaint, such as a thirty day suspension in October and November of 1997* (emphasis added)[14]

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[14]. This is the basis for PETITIONER'S argument that *res judicata* cannot be constitutionally applied (under ARTICLE VI clause 2 and section 1 of the Fourteenth Amendment of the Constitution of the United States of America) by a state court to bar claims which could not have been raised in her FEDERAL COMPLAINT at the time it was filed, and which a Federal District Judge refused to allow to be included in her federal litigation in response to a motion under Rule 15(d) of the Federal Rules of Civil Procedure.

On March 9, 1999 the arbitrator who had conducted the arbitration of the issues raised in the FEDERAL COMPLAINT released his opinion and order in which he determined:

> The Employer [RESPONDENTS] has been violating the Americans with Disabilities Act ("ADA") by not allowing the grievant [PETITIONER] to have a modified schedule from 11:00 a.m. to 7:30 p.m. (see APPENDIX "C")[15]

As the remedies for the violations of the ADA the Arbitrator determined that PETITIONER would:

1) Be allowed to work a modified schedule from 11:00 a.m. to 7:30 p.m.

2) Be paid her straight time wages and any benefits lost between January 8, 1997 and May 1, 1997; and

3) Have the two NDAs dated January 7, 1997 removed from her file[16].

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[15]. On this same date the state trial court (over PETITIONER'S objection) stayed further proceedings on THE STATE COMPLAINT pending final resolution of THE FEDERAL COMPLAINT.

[16]. The Arbitrator's findings were ultimately incorporated into the final judgment entered in APPELLANT'S federal action on June 26, 1998 after the entry of THE FEDERAL ORDER (APPENDIX "B").

The federal arbitrator (selected by PETITIONER'S Union and Employer in accordance with THE LMRA and a Collective Bargaining Agreement) made no attempt to deal with any issues raised by PETITIONER under state law, or determine whether PETITIONER was entitled to recover non-contractual damages based upon events occurring after the commencement of the federal action[17].

Although PETITIONER was not allowed to raise claims based upon RESPONDENTS' post filing conduct in the federal action because DISTRICT JUDGE BAIRD denied her request to file an amended complaint under Rule 15(d) of the Federal Rules of Civil Procedure; THE CALIFORNIA COURT OF APPEAL in its decision affirming the dismissal of PETITIONER'S STATE COMPLAINT held any further adjudication of those claims were barred because of what it referred to as California's primary rights theory (which it distinguishes from what it characterized as the federal "transactional" approach to the *res judicata issue)*[18].

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[17]. Significantly RESPONDENTS' had not given PETITIONER a definitive description of the nature of the thirty (30) day suspension which was the principal basis for her claims in PETITIONER'S STATE COMPLAINT until *after* the arbitration hearing was completed.

[18]. It is PETITIONER'S position that the distinction between the "transactional" and "primary rights" theory relied upon by THE CALIFORNIA COURT OF APPEAL in giving preclusive effect to THE FEDERAL ORDER cannot overcome the constitutional restrictions in ARTICLE VI clause 2 and section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

## THE DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS

Because the factual basis for the claims which are contained in THE STATE COMPLAINT could not be raised at the time PETITIONER filed her FEDERAL COMPLAINT on January 21, 1997 [and DISTRICT JUDGE BAIRD'S exercise of her discretion under Rule 15(d)[19]] THE CALIFORNIA COURT OF APPEAL'S decision which PETITIONER seeks to have this court review denied her right to have her state law claims adjudicated by any court (thus violating her due process rights under both the Fifth Amendment[20] and section 1 of the Fourteenth Amendment to the Constitution of the United States of America).

The effect of dismissal of PETITIONER'S STATE COMPLAINT (APPENDIX "F") and THE CALIFORNIA COURT OF APPEAL'S August 9, 1999 decision (APPENDIX "A") affirming its dismissal [based upon her failure to supplement her FEDERAL COMPLAINT pursuant to Rule 15(d) of the Federal Rules of Civil

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[19]. Which appeared to be reasonable because of the pendency of a proceeding in the state court which should have provided PETITIONER with an opportunity to have her post filing claims adjudicated.

[20]. A violation of the Fifth Amendment results if DISTRICT JUDGE BAIRD'S denial of PETITIONER'S motion under Rule 15(d) of the Federal Rules of Civil Procedure deprived her of the right to have her post filing claims adjudicated.

Procedure (which allows, but does not require a District Judge to expand the federal action to include post filing claims)] is to deny her the continuing protection which other disabled persons in California are entitled to under the provisions of California Government Code § 12940(k) because of her status as a federal litigant.

The importance of the constitutional issue in this case is highlighted by the fact that (as noted by THE CALIFORNIA COURT OF APPEAL in its unpublished decision) there appear to be no reported decision under either state or federal law which address the extent to which the equal protection clause under section 1 of the Fourteenth Amendment protects the rights of litigants during the course of litigation filed as a result of a continuing pattern of discrimination in violation of statutes enacted for their continuing protection.

## THE UNRESOLVED CONFLICT BETWEEN STATE AND FEDERAL LAW

**The decision of THE CALIFORNIA COURT OF APPEAL to ignore federal law in determining the *res judicata* effect of THE FEDERAL ORDER on PETITIONER'S right to pursue her state court remedies under FEHA raises an important question of law under ARTICLE VI clause 2 of the Constitution of the United States of America which only this court can resolve.**

**In the absence of such a decision on the issues raised by this petition qualified disabled litigants whose rights are subject to protection under both state and federal law will have no way of knowing how their rights under state law will be affected if they (for whatever reason) elect to proceed in the federal courts and are subject to the discretionary authority of federal judges under the Federal Rules of Civil Procedure.**

## THIS COURT IS THE ONLY TRIBUNAL WHICH IS CAPABLE OF RENDERING A DEFINITIVE DECISION ON THE ISSUES RAISED BY THIS PETITION

The issue of how a state court is to apply the doctrine of *res judicata* to a decision of a federal court which declines to deal with related claim between the litigants is one that has never been addressed by this or any other Court in a published opinion.

Because the issues raised in this PETITION have never been resolved by this court or in any published opinion by any other court, they are left to resolution by the courts of each of the fifty states in any way they choose (until there is a definitive and binding ruling by this court).

## PETITIONER'S LEGAL ARGUMENTS

### I.

### A STATE COURT SHOULD NOT BE ALLOWED TO GIVE GREATER PRECLUSIVE EFFECT TO A JUDGMENT OR ORDER THAN THE FEDERAL COURT WHICH ENTERED IT

The general principles of issue preclusion under federal law are set forth in this Court's decision in Montana v. United States 440 U.S. 147, 153-154, 99 S. Ct. 970, 973 (1979) which held:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, *is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction* . . . cannot be disputed in a subsequent suit between the same parties or their privies (citation omitted)(emphasis added)[21]

This Court's recitation of the general rules of preclusion is consistent with Restatement (Second) of Judgments § 27 (1982) which provides in comment e.:

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[21]. It is PETITIONER'S position that the issues raised in her STATE COMPLAINT were not at issue in the federal action filed on January 21, 1997 because in the FEDERAL ORDER filed on June 26, 1998 JUDGE BAIRD specifically declined the opportunity to consider them when she denied PETITIONER'S motion to file a first amended complaint which would have embodied those claims.

e. Issues not actually litigated. A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. There are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action.

see: Beard, THE ROLE OF RES JUDICATA IN RECOGNIZING UNITARY STATUS AND TERMINATING DESEGREGATION LITIGATION: A RESPONSE TO THE STRUCTURAL INJUNCTION 49 La. L. Rev. 1239, 1311 (July 1, 1989)

Under Rule 15(d) of the Federal Rules of Civil Procedure PETITIONER could have raised the issues that were the subject matter of her STATE COMPLAINT in the action she filed in a federal court on January 21, 1997 (which she in fact attempted to do), but she was not obligated to do so. Further, as demonstrated by DISTRICT JUDGE BAIRD'S June 26, 1998 decision (APPENDIX "B" at pages APX. 24-25 inclusive), the granting of leave to amend or supplement PETITIONER'S FEDERAL COMPLAINT was discretionary under Rule 15(d) of the Federal Rules of Civil Procedure and therefore a federal court is not obligated to allow the expansion of pending claims to include post filing claims for relief.

Under well established principles of federal practice a claim based upon new discriminatory conduct, motivated by the same discriminatory factors, is not affected by the

fact that a claim based upon earlier conduct is subject to preclusion.

see: Bazemore v. Friday 478 U.S. 385, 395-396, 106 S.Ct. 3000, 3006 (1986); Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 750 F.2d 731, 739 n.9 (9th Cir. 1984), cert. denied, 474 U.S. 919, 106 S. Ct. 247 (1985)

Further a federal litigant is not given the right to continue an illegal course of conduct during the course of litigation commenced by an employee in the federal courts.

see: Nealon vs. Stone 958 F.2d 584, 591-593 (4th Cir. 1991); Webb v. Indiana National Bank 931 F.2d 434, (7th Cir. 1990)

Thus under both the federal law and the recitation of the preclusive effect of *res judicata* contained in the RESTATEMENT a judgment is not conclusive in a subsequent action as to issues which might have been litigated [as is the case where a pleading is subject to supplementation under Rule 15(d)] but were not (because in this case a federal judge declined to allow an amended pleading to be filed). Therefore THE FEDERAL ORDER entered in the Federal District Court on June 26, 1998 should not have been given a preclusive effect as to claims which PETITIONER was not allowed to litigate in that action.

This Court has previously held that a federal court

cannot give a state court judgment greater preclusive effect than the state in which it was entered would give it. [see Marrese v. American Academy of Orthopedic Surgeons 470 U.S. 373, 382, 105 S.Ct. 1327, 1333 (1985)]. It would seem that under ARTICLE IV § 1, ARTICLE IV § 2, ARTICLE VI clause 2 and general principles of comity, a state court should be held to the same standard when issues of federal law arise.

Although 28 U.S.C. § 1738 and section 1 of ARTICLE IV of the Constitution of the United States of America make it clear that both state and federal courts must give full faith and credit to judgments entered in state courts, the issue of the effect a state court must give to a judgment entered in a federal court does not appear to have been addressed in any published decisions which we have been able to find (although it would appear under ARTICLE IV § 2 that each state must give the same benefits under federal law to its citizens as other states give to theirs).

Under ARTICLE VI clause 2 of the Constitution of the United States of America where state law conflicts with federal law, state law (not federal) must give way. (see Ridgeway v. Ridgeway 454 U.S. 46, 54, 102 S.Ct. 49, 54 (1981); Metropolitan Life Insurance Company v. Christ 979 F.2d. 575, 575 (7th Cir. 1992).

## II.

## A LITIGANT IN A FEDERAL COURT IS NOT OBLIGATED TO AMEND OR SUPPLEMENT HIS OR HER PLEADINGS TO INCLUDE CLAIMS BASED UPON EVENTS WHICH TAKE PLACE AFTER THE FILING OF HIS OR HER FEDERAL PLEADING

In its August 9, 1999 decision of THE CALIFORNIA COURT OF APPEAL, despite its having been provided with a copy of JUDGE BAIRD'S FEDERAL ORDER which describes the pleading in detail, castigates PETITIONER for having failed to provide either it, or the trial court with a copy of the First Amended Complaint (which is described in THE FEDERAL ORDER (APPENDIX "A" at page APX. 11). The decision then goes on to criticized APPELLANT for attempting to place her defense to *res judicata* on what the Court refers to as "litigation strategy of her federal court trial counsel"[22].

What THE CALIFORNIA COURT OF APPEAL'S decision fails to address, and what defines the issues in this PETITION is how any court (state or federal) can, under section 1 of the Fourteenth Amendment to the Constitution of the United States of America give preclusive effect to a judgment or order in which the tribunal entering the order

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[22]. Assuming it was a litigation strategy by PETITIONER'S union counsel, it would appear it was appropriate under Rule 15(d) of the Federal Rules of Civil Procedure and would not have led to the penalty of preclusion (which is the result of THE CALIFORNIA COURT OF APPEAL'S decision) in the Federal Courts.

has declined to accept jurisdiction over the precluded issues. Such a decision, when applied to the facts in this case (which must recognize the manner in which Rule 15(d) operates in the federal courts) creates a class of litigants (as PETITIONER argued in the state courts of California) who are denied the benefits of California's anti-discrimination laws based solely upon their failure (whether voluntary or involuntary) to amend their federal pleadings under the discretionary provisions of Rule 15(d).

In challenging what it refers to as PETITIONER'S federal "trial strategy"[23] and sanctioning her by denying her the right to pursue her post filing claims in a California Court THE CALIFORNIA COURT OF APPEAL fails to explain why [given the provisions of Rule 15(d)] the PETITIONER'S federal counsel's conduct, and a Federal District Court's refusal to allow inclusion of additional claims based upon post filing conduct can justify a federal litigant's loss of her rights as a disabled person under California law.

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[23]. A strategy which this Court has sanctioned by approving the adoption of Rule 15(d) of the Federal Rules of Civil Procedure.

## III.

## A STATE COURT CANNOT DENY A PARTY TO A FEDERAL ACTION THE OPPORTUNITY TO LITIGATE CLAIMS WHICH ARISE UNDER STATE LAW DURING THE FEDERAL ACTION'S PENDENCY

As pointed out above, the reason PETITIONER'S state court claims under FEHA were not adjudicated in THE FEDERAL ORDER because the decision by DISTRICT JUDGE BAIRD did not to allow them to become part of her federal claim. As a result there was no basis for precluding the adjudication of PETITIONER'S post filing claims in either the state courts of California, or the federal courts if coupled with appropriate claims under federal law.

By giving a decision in a federal court greater preclusive effect on issues which a federal judge declined to address THE CALIFORNIA COURT OF APPEAL violated PETITIONERS rights under well established constitutional principals of:

(a) Due process and equal protection under ARTICLE IV section 2 (as a citizen of California PETITIONER was entitled to the same protection as the citizens of other states who file claims in Federal Courts that a federal court declines to adjudicate);

(b) The Fifth Amendment (which requires a determination of claims through due process in

the federal courts before their judgment can preclude further litigation of the issues), and

(c) Section 1 of the Fourteenth Amendment which requires a state to provide equal protection under its laws even to citizens who are litigating claims in federal courts (who cannot be denied due process based up their inability to have their claims determined in a federal court).

## CONCLUSION

Because the issue raised by this PETITION involves an analysis of how state court judges respond to litigants who file claims in both state and federal courts, the issues raised by this PETITION can only be determined by a tribunal with jurisdiction to regulate both the state and federal judicial process. Because this is the only court with such jurisdiction review by certiorari is appropriate and should be granted.

LAW OFFICES OF JEROME ZAMOS

Jerome Zamos
Attorneys for Petitioner
LIZABETH URIBE

**APPENDIX "A" [Rule 14.1(i)(i)]**

**OPINION OF THE**
**COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA**
**DIVISION FIVE**
**(Unpublished Decision)**

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| LIZABETH URIBE, Plaintiff and Appellant, v. SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP et al., Defendants and Respondents. | ) B127338<br>)<br>) (Super. Ct. No. BC 183 619)<br>)<br>) Court of Appeal-Second Dist<br>) FILED<br>) AUG 09 1999<br>) Joseph A. Lane Clerk<br>) Deputy Clerk<br>) |

APPEAL from a judgment of the Superior Court of Los Angeles County Malcom H. Mackey, Judge. Affirmed.

Jerome Zamos for Plaintiff and Appellant.

Seyfarth, Shaw, Fairweather & Geraldson, F. Scott Page and David Van Pelt for Defendants and Respondents.

In January of 1997, appellant Lizabeth Uribe, a laboratory cytotechnologist, sued the Southern California Permanente Medical Group ("SCPMG") and Kaiser Foundation Hospitals in federal court, alleging that they were her employers and that they had violated the Americans With Disabilities Act ("ADA") by failing to make reasonable accommodations for her disability, post-polio syndrome The parties to that lawsuit agreed to arbitration.

At the end of 1997, before the federal court action was concluded, appellant filed this lawsuit under the Fair Employment and Housing Act ("FEHA") against the SCPMG, Kaiser Foundation Hospitals, Kaiser Foundation Health Plan,[1] and several SCPMG employees, all respondents here, alleging employment discrimination. The lawsuit was stayed pending resolution of the federal court action.

On March 9, 1998, the arbitrator in the federal court action found in appellant's favor. Appellant moved to lift the stay in this case. Respondents opposed the motion on the ground that the case was barred under the doctrine of

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[1]. In the federal court lawsuit, appellant alleged that her employer was Kaiser Foundations Hospital, Southern California Permanente Medical Group, a single entity. In this lawsuit, she alleged that she was jointly employed by SCPMG, Kaiser Foundations Hospitals, and Kaiser Foundation Health Plan. In its brief, respondents contend that appellant's employer was SCPMG. These differences are not material to any issue on appeal, and we refer to appellant's employer as "SCPMG" as a matter of convenience.

res judicata. After lifting the stay to allow respondents to move to dismiss on that ground, and to allow the issue to be briefed and argued, the trial court dismissed the case on the ground that it was barred under principles of res judicata This appeal followed. We affirm

Factual Summary

In federal court, appellant alleged that the SCPMG had violated the ADA by failing to adjust her work hours to accommodate her disability. Factually, she alleged that bathing, dressing, and otherwise preparing for work took three hours from the time she awoke. She required assistance with those tasks. Until January of 1997, at appellant's request and at the request of her union, the SCPMG accommodated appellant by allowing her to work from 11:00 a.m. to 7:30 p.m. In January, the SCPMG changed the cytotechnology shifts. Appellant was notified that as of January 6, 1997, she would be required to work from 8:00 a.m. to 4:30 p.m. Appellant could not obtain assistance at the early hours that shift would necessitate. She informed the SCPMG of her difficulties, but the SCPMG refused to alter her schedule. On January 8, appellant received two notices of disciplinary action, one for being late to work and one for working late. The notices stated that subsequent notices could result in her termination.

Appellant sought injunctive relief, including an order prohibiting the SCPMG from taking further disciplinary action against her for reporting to work late, and damages

according to proof.

Pursuant to a collective bargaining agreement, the parties agreed to arbitrate the lawsuit. The parties agreed on two of the issues to be decided, whether the SCPMG had just cause to issue the two disciplinary notices, and the appropriate remedy for any violation of the ADA. By stipulation of the parties, the arbitrator framed the other two issues after considering arguments submitted by the parties. Those issues were whether the SCPMG had violated the ADA, and whether the SCPMG had violated the collective bargaining agreement.

The arbitration hearing was conducted on October 27 and 31, 1997, and the matter was submitted on January 12, 1998. The arbitrator issued, his opinion and award on March 9, 1998. He found that the SCPMG had violated the ADA by not allowing appellant to work from 11:00 a.m. to 7:30 p.m. The arbitrator ordered that appellant be allowed to work that shift, that any wages and benefits she lost while required to work the earlier shift be restored, and that the disciplinary warnings be removed from her file. The arbitrator did not rule on the remaining two issues, whether the SCPMG had violated the ADA and/or the collective bargaining agreement, finding that they were encompassed by the findings which were made.

After the arbitrator made his award, appellant moved for leave to file an amended complaint. She did not oppose the SCPMG's motion to confirm the arbitration award, but did ask the federal court for a declaration on the effect of

the confirmation on her state court lawsuit, and also argued that the stipulation to arbitration did not include the ADA claims, The court refused appellant's request to file an amended complaint, found that the stipulation included the ADA claims, denied the request for declaratory relief, and confirmed the arbitration award. The opinion notes that "this Court expresses no opinion al this time on the possible res judicata and/or collateral estoppel consequences of the arbitration on the state case or any future federal case."

In her state court complaint, appellant alleged that respondents violated Government Code section 12940, subdivisions (f) and (g), which prohibit employers from discriminating against employees who oppose practices forbidden under FEHA; Government Code section 12940, subdivision (h)(1), which prohibits employers from harassing an employee due to the employee's disability; and Government Code section 12940, subdivision (i), which makes an employees failure to take all reasonable steps necessary to prevent harassment and discrimination an unlawful employment practice.

Appellant's factual allegations were that beginning in 1996, she complained to respondents about their failure to accommodate her physical disability. These complaints included complaints about the elimination of the 11 a.m. to 7:30 p.m. shift and complaints about difficulties she had with workplace locations and facilities which were not designed for use by wheelchair-bound individuals with limited strength. As the result of her complaints, appellant was subject to disciplinary action in the form of warnings

and a 30-day suspension in October and November of 1997, Also as a result of appellant's complaints, respondents failed to accommodate her physical disability. Appellant sought damages for mental anguish and stress, punitive damages, and other damages according to proof.[2]

In connection with the motion to dismiss, respondents submitted the notice given to appellant concerning her October suspension. The notice, dated November 5, 1997, indicated that appellant was placed on investigatory suspension on October 22 It stated that beginning in July of 1997, appellant on numerous occasions requested and received permission to arrive at work late, and to make up the time by working late, based on her written representation that she had morning doctors' appointments for physical therapy. Investigation revealed that she did not have doctors' appointments. Respondents had decided against termination, but imposed a thirty-day suspension, based on willful misrepresentation of information

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[2]. We grant respondents' request that we take judicial notice of a subsequent complaint, filed by appellant against respondents in July of 1998. It alleges harassment and discrimination based on her disability and in retaliation for her pursuit of her rights, under FEHA. The factual allegations concern events beginning in December of 1996 and continuing through 1998, including the November 1997 suspension. The trial court noted this lawsuit in its ruling dismissing this case, finding that "plaintiff can litigate post-federal arbitration claims under [her] new case . . . ." In their briefs, the parties have informed us that the new case had been dismissed. We also grant respondents' request that we take judicial notice of a declaration submitted in the federal court action.

In her declaration in response to respondents' motion, appellant declared that she was required to engage in physical therapy at home, that in July of 1997 she began to have conflicts with her supervisor about taking time to for those activities, resulting in written notice on October 23, 1997, that respondents were considering discipline against her.

## Discussion

Appellant argues that res judicata does not bar this lawsuit because the conduct complained of took place after the federal court complaint was filed. In support, she relies on federal cases which hold that where a defendant engages in actionable conduct after a lawsuit is filed, a plaintiff may, but need not, file a supplemental complaint, and also hold that the doctrine of res judicata will not be used to punish a plaintiff who does not file such a complaint. (S. E. C. v. First Jersey Securities, Inc. 101 F. 3d 1450, 1464 (2d Cir. 1996); Clark v. Bear Stearns & Co., Inc.(9th Cir. 1992) 966 F. 2d 1318.)

'Those cases are of no assistance to us. The cited holding is based on the federal courts' use of a trans-actional analysis for defining "cause of action" for purposes of res judicata. Under that analysis, "two suits constitute a single cause of action if they both arise from the same 'transactional nucleus of facts' [citation] .... California follows the primary right theory of Pomeroy; i.e., a cause of action consists of 1) a primary right possessed by the plaintiff, 2) a corresponding primary duty devolving upon

the defendant, and 3) a delict or wrong done by the defendant which consists in a breach of such primary right and duty. (4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 23, pp. 66-67.) Thus, two actions constitute a single cause of action if they both affect the same primary right. Where, as here, an action is filed in a California state court and the defendant claims the suit is barred by a final federal judgment, California law will determine the res judicata effect of the prior federal court judgment on the basis of whether the federal and state actions involve the same primary right. (Agarwal v. Johnson (1979) 25 Cal.3d 932, 954-955 [1.]" (Gamble v. General Foods Corp. (1991) 229 Cal.App.3d 893, 898.)

Under California law, "[i]f the same primary right is involved in two actions, judgment in the first bars consideration not only of all matters raised in the first suit, but also all matters which could have been raised." (Eichman v. Fotomat Corp. (1983) 147 Cal.App.3d 1170, 1175.)

Respondents argue that the same primary right was at stake in both lawsuits here, characterizing that right as the right to be free from discrimination based on disability. Respondents cite in support Mattson v. City of Costa Mesa (1980) 106 Cal.App.3d 441. There, the plaintiffs federal court suit alleged that his civil rights were violated when the defendant police officers assaulted him, wrongfully arrested him, and took his money. On the same facts, the state court action alleged that the police officers had negligently assaulted, battered, and arrested plaintiff, and had

mishandled his personal property On appeal, the plaintiff did not contend that two lawsuits involved different primary rights, and the Court found that the same primary right was involved. (Id. at p. 447.)

Similarly, in Johnson v. American Airlines, Inc 1984) 157 Cal.App.3d 427, the plaintiff was a member of a class certified for a class action lawsuit on behalf of flight attendants who had been adversely affected by the airline's maternity leave policy, The litigation was decided in favor the employees. Appellant later filed suit in the state court challenging the airline's maternity leave policy, Appellant argued that the federal court action did not bar the second action, since causes of action were different, in that the federal action alleged violations of federal, not state, law The Court of Appeal rejected this argument, finding that the primary right, the right to be free from employment discrimination based on sex, was the same in both cases. (Id. at p. 433.) Other cases have reached the same conclusion: the right to be free of discrimination in employment is a primary right which cannot be addressed both in federal court, under federal antidiscrimination laws, and in state court, under FEHA and similar laws. (Gamble v. General Foods, supra, 229 Cal.App.3d at p. 901 [primary right to employment at stake in both federal Title VII case based on termination of employment and state court wrongful termination suit]; Acuna v. Regents of University of California (1997) 56 Cal.App.4th 639, 648-649 [primary right to be free from employment discrimination operative in federal Title VII and ADEA suit and factually identical state court FEHA suit].)

**This case is substantially similar to those just discussed. Although the complaint is partly phrased in terms of discrimination based on the assertion of legal rights, rather than discrimination based on disability, when the factual allegations of the two complaints are examined, it is apparent that retaliation is simply an alternate theory based on the same facts as those raised in the federal court, with the same primary right at stake. In the federal court, appellant contended that after January 6, 1997, her disability was not accommodated with a later work shift, and that she was disciplined when she arrived at work late In the state court action, she alleged that respondents continued to impose discipline when she arrived at work late. " [T]he 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." (Slater v. Blackwood (1975) 15 Cal.3d 791, 795.)**

**Appellant's central argument is not that different primary rights were at stake, but that the November 1997 suspension was not litigated in the federal court suit. She offers no legal argument on the applicable legal principle, that res judicata applies if the matter could have been raised in that forum (Eichman v. Fotomat Corp., supra, 147 Cal.App.3d at p. 1175), and makes no attempt to argue that this case is governed by those cases which have found that a federal court judgment does not have res judicata effect because the federal court refused to hear pendent state court claims, or did not have jurisdiction to hear a**

theory or ground for recovery. (Mattson v. City of Costa Mesa, supra, 106 Cal.App.3d at p. 445; Koch v. Hankins (1990) 223 Cal.App.3d 1599,1605.)

Appellant makes no showing that she asked the federal court to decide the claims raised in the state court. instead, she cites the federal court ruling denying her request to file an amended complaint, and her declaration that when she inquired about the possibility of raising t he events which led to the November suspension in the arbitration, her union[3] advised her those matters could not be considered. This is not sufficient.

Appellant has not provided us, or, apparently, the trial court, with a copy of the proposed first amended complaint in federal court. And, to the extent that new matters were excluded from the arbitration, she has made no showing that they were excluded for any reason other than her stipulation to the arbitration. Appellant thus appears to be attempting to assert the litigation strategy of her federal court trial counsel as a defense to res judicata. Of course, she may not do so.

Finally, appellant argues that principles of equal protection bar the dismissal of the state court lawsuit, since such a ruling would create a class of persons (persons with federal lawsuits pending) who cannot receive the benefits of state anti-discrimination laws. Appellant cites no authority

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[3]. Appellant was apparently represented by a union lawyer in the federal lawsuit.

for this argument. We see no violation of constitutional guarantees of equal protection in the application of principles of res judicata to this case.

**Disposition**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J,

We concur:

GRIGNON, Acting PJ

GODOY PEREZ, J.

**APPENDIX "B" [Rule 14.1.(i)(ii)]**

**ORDER GRANTING DEFENDANTS' MOTION TO CONFIRM ARBITRATION AWARD IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ENTERED ON JUNE 26, 1998**

**(Unpublished Decision)**

**THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(D).**

ENTERED
CLERK U.S DISTRICT COURT
JUN 26 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
CLERK U.S DISTRICT COURT
JUN 22 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | | |
|---|---|---|
| LIZABETH URIBE, et al | ) | CV 97-0375 LGB (Mcx) |
| | ) | |
| Plaintiffs, | ) | ORDER GRANTING |
| | )DEFENDANT'S MOTION TO | |
| v. | ) | CONFIRM ARBITRATION |
| | ) | AWARD |
| KAISER FOUND. | ) | |
| HOSP., et al. | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

## I. Introduction

In this case, Plaintiff Uribe ("Plaintiff"and her Union

have sued Defendants ("Kaiser" alleging violation of the Americans with Disabilities Act "ADA" 42 U.S.C. § 12101 et seq., and seeking an injunction in aid of arbitration under the Labor Management Relations Act ("LMRA" , 29 U.S.C. § 185. The parties stipulated to binding arbitration, which has resulted in an Award for Plaintiff Defendants have filed the instant Motion to Confirm Arbitration Award, which is not opposed, although Plaintiff seeks a declaratory judgment defining the impact of the Award This Motion came on regularly for hearing on June 22, 1998 Having reviewed all pertinent papers on file and considered the arguments of counsel, and for the reasons discussed below the Court hereby CONFIRMS the Arbitration Award, entering judgment thereon. This will close the case;
accordingly, Plaintiff's request for a declaration is DENIED.

## II. Factual and Procedural Background

The following facts are no longer disputed and are taken from the Arbitration Opinion provided as Exhibit C to the Kaufman Declaration, unless otherwise noted.

Plaintiff has been employed by Kaiser as a cytotechnologist ("CT") at one of its laboratories since March 1981. CT's screen gynecological and other specimens, documenting any abnormal cells that they observe. Plaintiff has been wheelchair bound since early childhood due to polio. As a consequence of her medical condition, it requires approximately three and a half hours

to get ready for work with the aid of a helper. Accordingly, Plaintiff preferred a work starting time as late-as possible

In 1995, Plaintiff obtained a medical certification from her Kaiser internist that she be allowed to continue her 11:00 a 7:30 p.m. shift. In December 1996, Kaiser informed Plaintiff that she would have to work 8:00 a.m. - 4:30 p.m., due to a reorganization of Plaintiff's department intended to reduce processing time for the specimens. On January 3, 1997, Plaintiff told Kaiser that requiring her to start at 8:00 a.m. violated her rights under the ADA. Nevertheless, Plaintiff was told that she would have to start her new schedule on January 6, 1997 Instead, Plaintiff reported at her usual (11:00 a.m. time. On January 7, 1997, Plaintiff was given two written warnings for coming to work late and for leaving late (at her old 7:30 p.m time).

On January 8, 1997 an agreement was reached allowing Plaintiff to work 11:00-4:30 without further discipline until her request for accommodation could be further investigated. On January 14,1997, Plaintiff filed a grievance under the collective bargaining agreement ("CBA"). On January 21, 1997 Plaintiff filed her Complaint in this Court. This Complaint contained two causes of action: (1 a violation of the ADA, and (2) a request for an injunction in aid of arbitration under the LMRA. Plaintiff sought damages and injunctive relief.

On February 7, 1997, Plaintiff petitioned" the Court for a temporary restraining order ("TRO"). She sought to enjoin Kaiser from (1) imposing any work schedule on

plaintiff Uribe other than an 11:00 a.m. to 7:30 p.m. work schedule, and (2) taking any further disciplinary action against Uribe, including discharge, for reporting late to work for any work shift that is scheduled to begin prior to 11:00 a.m. At the hearing held on February 13, 1997, the Court denied Plaintiff's request for a TRO and set the matter for hearing on an order to show cause why a preliminary injunction should not issue. The Court also set a schedule for supplemental briefing.

Following the supplemental briefing, a hearing was held on Plaintiff's OSC re: Preliminary Injunction. By Order filed March 17, 1997, the Court denied Plaintiff's preliminary injunction.

By Stipulation filed on April 30, 1997, the parties agreed that:

> All claims alleged in this action against Defendants KAISER FOUNDATION HOSPITALS, and the SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP should and shall be submitted to binding arbitration pursuant to the grievance and arbitration provisions within the applicable collective bargaining agreement in existence between Defendants and Plaintiff Hospitals and Service Employees Union, SEIU, Local 399; and the above captioned matter should be and shall be stayed pending resolution of that arbitration.

(Kaufman Decl. Ex. A (the Stipulation) ¶ 1.) Based on this Stipulation, on May 29, 1997, the Court ordered this case removed from the Court's active caseload.

Meanwhile, on April 17, 1997, Kaiser notified the Union that its investigation of Plaintiff's request for accommodation (the later work schedule) had been completed, and that no accommodation would be made. On April 28, 1997, Plaintiff was informed that she could begin work either at 8:00 or at 9:00 and work a full day. Plaintiff opted for the 9:00-5:30 schedule beginning May 1, 1997, and continuing during the pendency of the arbitration of her grievance and federal case.

On December 31, 1997, Plaintiff filed a Complaint in state court under the Fair Employment and Housing Act ("FEHA", Cal Gov't Code § 12940 et seq. This Complaint, although in many ways similar to the Complaint in the instant case, differs in four regards: 1) it names several individual Kaiser employees as defendants in addition to Kaiser; 2) it is based exclusively on FEHA, rather than on the ADA and LMRA; 3) it alleges harassment and retaliation as well as discrimination; and 4) it alleges certain conduct occurring later in time than the federal Complaint, such as a thirty day suspension in October and November of 1997. On March 12, 1998, the state court case was stayed pending completion of the federal case.

On March 9, 1998, the arbitrator issued his opinion and Award, attached as Exhibit C to the Kaufman Declaration. Therein, the arbitrator found for Plaintiff.

**The Award is as follows:**

> **1. The Employer has been violating the Americans with Disabilities Act ("ADA") by not allowing the grievant to have a modified schedule from 11:00 a.m. to 7:30 p.m.**
>
> **2. For remedy, the grievant shall 1) be allowed to work a modified schedule from 11:00 a.m. to 7:30 p.m. effective immediately, 2) be paid her straight time wages and any benefits lost between January 8, 1997 and May 1, 1997, and 3) have the two [disciplinary warnings] dated January 7, 1997 removed from her file.**

**(Kaufman decl Ex C (Arbitration opinion and Award) at 17.)**

**On April 7, 1998, and April 9, 1998, Plaintiff filed two Motions in this Court: 1) Motion for Leave to File First Amended Complaint[1] and 2) Motion for Partial Summary Judgment.[2] On April 20, 1998 Defendants filed an**

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**[1]. This Motion sought leave to file an amended complaint which essentially incorporates the state case into this case. Although the proposed 1AC relies on both FEHA and the ADA, it, like the state complaint, adds the individual defendants, alleges harassment and retaliation, and alleges certain wrongdoing occurring later in time than that alleged in the original Complaint in this case.**

**[2]. This Motion sought summary adjudication of numerous issues, including some raised only in the proposed 1AC.**

Opposition. By Minute Order dated April 23, 1998, the Court vacated the hearing date on Plaintiff's two Motions, because 1) the case was still stayed, and thus, no other motions should have been filed until the stay was lifted; and 2) Plaintiff failed to comply with the new Local Rule 7.4.1 which requires a "meet and confer" 20 days prior to filing these kinds of motions

On April 28, 1998, Plaintiff filed an ex parte Application to reinstate this case to the Court's active caseload, and to set a hearing on Plaintiff's two motions. On April 29, 1998 Defendants filed an Opposition, stating that the Court should schedule a status conference to allow the parties to bring the Court up to date on the facts of this case and to discuss the procedural issues remaining. Defendants asserted that such a conference "may well serve to resolve the issues currently in dispute." (Opp. at 2.)

A telephone conference was held on May 14, 1998. By Minute Order dated May 14, 1998, this case was reinstated to the Court's active caseload. The Court determined that the first issue to be resolved was the effect of the Arbitration Award and the stipulation to arbitrate on this case. Consequently, the Court ordered a briefing schedule for a Motion to Confirm the Arbitration Award. Pursuant to this schedule, Kaiser filed the instant Motion on May 27, 1998. Plaintiff filed a "Response" on June 8, 1998, and Kaiser filed a Reply on June 15, 1998. A hearing was held on June 22, 1998.

## III. Analysis

The instant Motion seeks to confirm the Arbitration Award in this case. This aspect of the Motion is unopposed. (See Pl.s Response at 1:19-23 "At the outset PLAINTIFF wishes to make it clear that she is not opposed to the confirmation of the arbitration award that resulted from the arbitration which took place pursuant to the stipulation of counsel and the order previously entered by this Court") Plaintiff's Response is instead devoted to arguing over the effects of such confirmation on her state law case and her proposed 1AC in this case.

The Federal Arbitration Act "FAA"),provides,that if the parties have so agreed, upon application to the court within one year of the arbitration "the court must grant an order [confirming the award] unless the award is vacated, modified, or corrected as prescribed in (other sections of the Act] 9 U.S.C. § 9. An agreement by the parties that the arbitrator's award is to be final and binding is sufficient to invoke § 9 at least where the parties participated fully in the arbitration process. See, e.g., Booth v. Hume Pub., Inc., 902 F.2d 925, 929-30 (11th Cir. 1990) (collecting cases).

In the case at bar, as described above, the parties stipulated that "[a]ll claims alleged in this action should and shall be submitted to binding arbitration . . . ." (See Kaufman Decl Ex A (the Stipulation) ¶ 1.) accordingly, since neither party suggests that there are any grounds for vacating, modifying, or correcting the Award, this Court "must" confirm the Award pursuant to 9 U.S.C. § 9. The

effect of such confirmation is also provided by the FAA:

> The party moving for an order confirming . . . an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file (a variety of documents].
>
> The judgment shall be docketed as if it was rendered in an action.
>
> The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered. 9 U.S.C. § 13.

In other words, this court's confirmation of the Arbitration Award results in a final judgment being entered upon it, with the same force and effect as if this case had proceeded to trial and had judgment entered at that point.

Although not entirely clear, Plaintiff appears to argue that the stipulation to submit to arbitration only covered Plaintiff's claims under the CBA, and not her statutory claim under the ADA (See Pl's Response at 2:7-12.) Such contention is clearly contradicted by the plain language of the Stipulation. The Stipulation agreed to submit to binding arbitration "[a]11 claims alleged in this action. . . . "

(Kaufman Decl. Ex. A (the Stipulation) ¶ 1.) The Complaint in this action alleged a violation of the ADA; accordingly, Plaintiff's ADA claim was covered by the Stipulation.[3]

Plaintiff also appears to argue that arbitration of statutory claims is impermissible under Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), and its progeny. (See Pl's Response at 6-8.) However, these cases are inapplicable, as they involve the question of whether arbitration of a grievance under a CEA's antidiscrimination provision bars a later statutory discrimination case. For example, had Plaintiff arbitrated only her grievance under the CBA's antidiscrimination provision, she would then be

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[3]. As further evidence that Plaintiff submitted not only her CBA claim but also her ADA claim to the binding arbitration, at the arbitration hearing Defendants, counsel stated as follows:

> It is very unique for parties to agree to allow the Arbitrator to decide an Americans with Disabilities Act. While unique, it does occur, and it is occurring more and more. Parties are going to this type of forum to decide those issued. But also, just for clarity, I wanted to make sure that, on the record, Ms. Uribe is agreeable with allowing you to decide those issues also . . . .

(Kaufman Decl. Ex. D (transcript of arbitration proceedings) Plaintiff's counsel stated that "Yes. I have spoken with Ms. Uribe and she is aware that is what is occurring." (Id.) Plaintiff's counsel then asked Plaintiff, "Ms. Uribe, are you in agreement that the Arbitrator can address the Americans with Disabilities Act issues in your case, in this arbitration?" (Id.) To which Plaintiff responded, "Yes." (Id.) Thus, it could not be clearer that Plaintiff submitted her ADA claim to the binding arbitration.

able to litigate her ADA claim. As explained above, however, Plaintiff chose to also arbitrate her ADA claim at the same time. As the Ninth Circuit recently stated in holding that employers may not require employees to agree in advance to submit future discrimination claims to arbitration instead of litigation,

> we do not, of course, mean to suggest that Congress sought in the 1991 [Civil Rights] Act to preclude employees from agreeing after a claim has arisen to submit the dispute to arbitration. Indeed, employees in many instances may believe that arbitration is preferable to protracted and expensive litigation and will willingly make that choice. Because of the legal community's recently increased faith in arbitration, those plaintiffs are now "encouraged" to resolve their employment disputes in that manner, and if they choose to do so, they are bound by the arbitrator's decision. Duffield v. Robertson, F.3d 1998 WL 227469 at *17 (9th Cir. 1998).

Accordingly, Plaintiff is bound to the arbitrator's decision in this case, and may not relitigate the same ADA claims that were the subject of that arbitration.

Plaintiff next argues that not all of the claims raised by the state complaint and the proposed 1AC in this case were part of the arbitration. This appears to be true. For example, the claims against the individual defendants were

not addressed by the arbitrator, since the individual defendants were neither parties in the instant case, nor to the CBA Additionally, claims based on alleged wrongdoing occurring after the arbitration could not have been addressed therein. Of course, this Court expresses no opinion at this time on the possible res judicata and/or collateral estoppel consequences of the arbitration on the state case or any future federal cases. That is not a matter properly before this Court at the present time.

The Court turns next to Plaintiff's request in her Response to the instant Motion to Confirm for a declaratory judgment "defining the scope and impact of the Arbitration Award." (See Pl's Response at 8-10). Initially, the Court notes that a "Response" to a motion to confirm Arbitration award does not appear to be the correct way to seek a declaratory judgment rather, an amended complaint seeking such relief would be proper. In any event, the declaration that Plaintiff seeks covers matters already pending in her state court case. Essentially, Plaintiff seeks a declaration as to the effect of the arbitration on her state law A claims. For reasons of comity and judicial economy, this Court declines to entertain such a request. See Government Employees Ins. Co. v. Civil, 133 F.3d 1220, 1225 9th Cir 1998) (en banc).[4]

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[4]. Plaintiff states that she has no preference as to whether her dispute is litigated in state court or this Court, as long as she has an opportunity to litigate somewhere. (See Pl.'s Response at 9 n.1.)

In summary, this Court CONFIRMS the Arbitration Award, and enters final judgment thereon. This closes the instant case; accordingly, Plaintiff may not amend her Complaint in this case.[5] Since this case will be concluded, presumably the stay of Plaintiff's state court case will be lifted, and Plaintiff will have an opportunity to litigate that case in state court, subject to the res judicata/collateral estoppel effects of the judgment in the instant case as determined by the state court.

## IV. Conclusion

For the above reasons, Defendant's Motion to Confirm Arbitration Award is GRANTED. The Arbitration Award is CONFIRMED, and judgment is entered thereon. Plaintiff's request for a declaratory judgment is DENIED

IT IS SO ORDERED.

Dated: June 22, 1998 /s/ Lourdes G. Baird
LOURDES G. BAIRD
United States District Judge

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[5]. Although Plaintiff could, of course, file a new complaint alleging any wrongdoing not covered by the arbitration.

**APPENDIX "C" [Rule 14.1.(i)(ii)]**

**FEDERAL ARBITRATOR'S OPINION AND AWARD CONFIRMED BY ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA**

| | | |
|---|---|---|
| In the Matter of Arbitration | ) | ARBITRATOR'S |
| | ) | OPINION |
| between: | ) | AND |
| | ) | AWARD |
| SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP | ) | |
| | ) | |
| and | ) | Case No. 96197 |
| | ) | |
| HOSPITAL AND SERVICE EMPLOYEES UNION, LOCAL 399, SEIU, AFL-CIO | ) | |
| | ) | |
| (Grievance of Lizabeth Uribe) | ) | |

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Impartial Arbitrator: Fredric R. Horowitz, Esq.

Appearances:

Union and Grievant: James Rutkowski, Esq.
Alberto O. Torrico, Esq. (on Brief)
Van Bourg, Weinberg, Roger & Rosenfeld

Company: Carlos Zaragoza, Esq.
Senior Counsel

| | |
|---|---|
| **Hearings Held:** | **October 27, 1997**<br>**North Hollywood, California** |
| | **October 31, 1997**<br>**Panorama City, California** |
| **Submitted to Arbitrator:** | **January 12, 1998** |

**This arbitration arises pursuant to the collective bargaining agreement effective June 19, 1996 ("Agreement") between the Southern California Permanente Medical Group "Employer") and the Hospital Service Employees Union, Local-399, SEIU, AFL-CIO ("Union"). The parties concur the grievances have been processed pursuant to the provisions of Article XVIII of the Agreement and the matters at issue are properly in arbitration.**

## MATTERS AT ISSUE

**The grievances filed by Lizabeth Uribe present the following issues to be decided in arbitration:**

1. **Did the Employer have just cause to issue the two NDAs to the grievant on January 7, 1997?**

2. **Is the Employer violating the Agreement by not allowing the grievant to have a modified schedule from 11:00 a.m. to 7:30 p.m.?**

3. **Is the Employer violating the Americans with**

Disabilities Act ("ADA") by not allowing the grievant to have a modified schedule from 11:00 a.m. to 7:30 p.m.?

4. If yes, what is the appropriate remedy?

The parties stipulated at the hearing on the wording of issues no. 1 and 4 above and that the arbitrator would have authority to decide the ADA issues in this case. The grievant consented to having the ADA issues decided by the arbitrator. Because the parties could not agree on the wording of issues no. 2 and 3, the parties presented separate statements and stipulated the arbitrator would have the authority to frame those issues.

## BACKGROUND

The grievant, Lizabeth Uribe, has been employed by Kaiser as a Cytotechnologist ("CT") at the North Hollywood Laboratory since March 11 1961. Approximately 40 Cts at this location screen gynecological ("GYN") and non-gynecological ("non-GYN") specimens, document any abnormal cells they observe, and record their findings. GYN specimens are pap-smears, while all other specimens are considered non-GYN including sputum, urine, thyroid aspiration, or bronchial aspiration. The :Cytology Department at the North Hollywood Laboratory serves hospital patients and out-patients from several Kaiser facilities.

Uribe has been wheelchair bound since early

childhood due to polio. She currently suffers from post-polio syndrome and relapsing polychondritis which causes swelling of the cartilage, swelling of the lower extremities, pain in the joints, and lack of mobility, especially when it is cold. As a result, she needs about three and one-half hours to get ready for work. She lives only with her elderly mother. Her daily regimen, which includes exercise, bathing, dressing, eating, and getting in and out of her car, is difficult and time consuming. She requires assistance from a paid helper or, if not available, a friend or family member. Although her hours varied over the years, she prefers to have a starting time as late as possible. on September 19, 1995, Uribe obtained a medical certification from her Kaiser internist, Dr. Matthew Schneiderman, for two requested accommodations: 1) to continue her 11,00 a.m.-7:30 p.m. schedule because of time needed to get ready for work and 2) extra time daily to go to the bathroom because she needs to drink a large volume of fluids.

In June 1995, Regional Laboratory Director Michael O'Connell, M.D. initiated a major effort to reduce the turnaround time of normal pap smears from the current 14-21 days to 7 days or less. After extensive e study, management reorganized the procedures for processing specimens in the Cytology Department. Among the changes implemented were the work hours of various classifications of employees. Cts had been assigned schedules ranging in times from 6:00 a.m.-2:30 p.m. to 11:00 a.m.-7:30 p.m

In November 1996, management disseminated a bid

preference for new schedules for Cts ranging from' 4:30 a.m.-1:00 p.m. to 8:00 a.m.4:30 p.m. to begin in January 1997. The bid preference also showed schedules from 11:00 a.m.-7:30 p.m. for QC Technologists and Lab Assistants. On December 5, 1996, Cytology Lab Supervisor Kathy Smith informed Uribe she would have to accept a change from her schedule from 11:00 a.m.-7:30 p.m. to 8:00 a.M.-4:30 p.m. Monday-Friday. Thereafter, the grievant sought help from the Union and the Personnel Department to retain her current schedule.

On Friday, January 3, 1997, Uribe explained to Smith that making her start at 8:00 a.m. violated her rights under the ADA and that any NDA would be opposed with legal action. After checking with management, Smith informed the grievant she would have to begin her new schedule on Monday, January 6, 1997. The grievant, however, did not report for work until 11:00 a.m. on the following Monday and Tuesday Uribe remained at work on Monday until 7:30 p.m.

On Tuesday, January 7, 1997, the grievant was handed two written warnings. One NDA was issued for coming to work three hours late on January 6 and 7, 1997. The other NDA was given f or not leaving work at 4:30 p.m. Monday as scheduled. on January 8, 1997, an agreement was struck between the Union and the Employer which allowed Uribe to work from 11:00 a.m. to 4:30 p.m. Monday-Friday without facing further discipline until her request for an accommodation could be further investigated and assessed.

On January 14, 1997, Uribe filed three grievances alleging a violation of the Agreement and applicable statutes. One grievance challenged the denial of the modified work schedule, another the two NDAs, and the third sought a remedy f or her lost wages based on the reduction of hours, On January 21, 1997, the grievant and the Union filed a lawsuit against the Employer in federal court related to these claims.

Uribe obtained a letter from Dr. Schneiderman dated January 15, 1997 requesting that Uribe be accommodated with a schedule starting at 11:00 a.m. On January 29, 1997, HR Consultant Carolyn Gomez wrote Dr Schneiderman for clarification of the medical basis for any accommodation. On February 4, 1997, Dr. Andrea Nachenberg from Kaiser wrote a note requesting Uribe be given a later shift because she needs several hours to get ready for work. On February 26, 1997, Dr. Schneiderman replied to Gomez that Uribe's pain and stiffness was worse in the early morning due to cold temperatures and prolongs the time she needs to warm up her muscles, joints, and soft tissues.

Meanwhile, effective February 1997, management changed most CT schedules to start at 5:15 a.m., 7:00 a,m., 8:00 a.m., or 9:00 a.m. On February 4, 1997, the grievant renewed her request to Smith in writing for a later start time based on her medical condition. Uribe argued further justification for an 11:00 a.m. schedule was presented on the basis that some Cts were being allowed to work overtime as late as 7:30 p.m

On April 17, 1997, HR Consultant Gomez notified the

Union the investigation had been completed. Gomez indicated management was not obligated under the ADA to create a new shift for Uribe and that the time it took her to get ready for work was not relevant to the start time. Gomez nevertheless offered to allow the grievant to work a full shift from 9:00 a.m.-5:30 p.m. On April 28, 1997, Supervisor Smith informed the grievant her request for an 11:00 a.m. schedule was being denied but that she had the option to elect a full shift beginning at either 8:00 a.m. or 9:00 a.m, The grievant opted for the schedule to begin at 9:00 a.m. effective May 1, 1997.

On April 29, 1997, the federal court litigation was stayed based on the agreement of the grievant, the Union and the Employer to submit the claims against the Employer to binding arbitration. After the parties were unable to resolve the dispute through the steps of the contractual grievance procedure, the matter-was duly submitted for determination in arbitration herein

## EXCERPTS FROM THE AGREEMENT

### ARTICLE XXI – NONDISCRIMINATION

2101. The Employer and the Union agree that no employee or applicant for employment shall be discriminated against with the implementation of this Agreement or any other terms and conditions of employment in regard to race, color, religion, age, sex, national origin, sexual orientation, physical or mental handicap or veteran status.

ARTICLE XXVI – DURATION OF AGREEMENT

2602. The Employer agrees to comply with all applicable State and Federal laws. If any provision of this Agreement is found to be in conflict with the laws of the State of California or of the United States of America, the remaining provisions of the Agreement shall remain in full force and effect.

## POSITIONS OF THE PARTIES

The Union asserts the grievant is a disabled employee as defined by the ADA who can perform the essential duties of her position with a reasonable accommodation of modified work schedule. The Union claims the Employer has failed to demonstrate an 11:00 a.m. start time poses an undue hardship under the criteria established by the Act. It is said other Cts are routinely allowed to work until 7:30 p.m. for a variety of personal reasons. Local 399 also asserts a two hour delay in start time for the grievant will have no material adverse affect on the turnaround time of the operation. For these reasons, the Union asks the grievant's schedule be accommodated, she be made whole for all lost wages between January 8, 1997 and May 1, -1997, and the two NDAs be removed.

In its turn, the Employer contends the ADA does not mandate a special schedule to be created for Uribe from 11:00 a.m.-7:30 p.m. The Employer maintains the evidence

does not show a special shift was needed because of her disability and, in any event, the ADA does not require an employer to create a new shift. It is said the request for a special schedule would also create an undue hardship on the Employer because slides processed in the last two hours could not be released until the following day. Kaiser further asserts a request to create a special shift is beyond the scope of the Agreement and that the NDAs were issued for just cause. Accordingly, the Employer urges the grievances and claims at issue be denied.

## OPINION

The Americans with Disabilities Act, 42 U.S.C. §12101, et seq., prohibits an employer from discriminating against a qualified individual with a disability because of such disability in regard to hiring, advancement, discharge, compensation, training, or other terms, conditions, and privileges of employment. 42 U.S.C. §12112(a). The ADA defines disability as a physical or mental impairment which substantially limits one or more of major life activities of the individual. 42 U.S.C. §12102(2). A qualified individual with a disability is one who, with or without reasonable accommodation, can perform the essential functions of the position. 42 U.S.C. §12111(8), In order to establish a prima facie case of discrimination under the ADA, the grievant, Cytotechnologist Lizabeth Uribe, must show the following: 1) she is a disabled person within the meaning of the Act; 2) she is a "qualified individual" as defined in the Act; and 3) she suffered an adverse employment action because of her disability once a prima facie-case is established, the

burden shifts to the Employer to demonstrate a reasonable accommodation was not available. Heise v. Genuine Parts, 4 AD Cases 1551, '1561 (D.C. Minn. 1995).

There is no dispute the grievant is a disabled person within the meaning of the ADA. She has been wheelchair bound-since childhood from the ravages of polio and is unable to walk or easily perform a variety of routing physical tasks. Her disability thus substantially limits one or more of the major life activities

Nor is there any disagreement in this proceeding the grievant is a qualified individual with a disability under the Act. Despite her Physical handicap, she remains fully able, with or without reasonable accommodation, to perform all the essential functions of her position as she has over the past 18 years.

The parties are divided, however, whether Uribe has suffered an adverse job action because of her disability. The Union asserts the extended time it takes her to get ready for work each morning due to her disability makes it unreasonably difficult for her to begin work before 11:00 a.m. The employer maintains an accommodation is not required by the ADA because the time it takes the grievant to get ready for work is not related to her start time. A review of the evidence at arbitration, on balance, supports the position of the Union.

The record reflects the grievant endures a formidable daily routine in order to get ready for work. The regimen

takes about three and one half hours to complete from the time she wakes up to arriving at the work site. Uribe always awakens with stiff, swollen joints and muscles. It takes 20 minutes to slowly move her hands, arms and legs and message her joints until she can transfer from bed to a chair. In the winter, according to the grievant, the process can take 10 minutes longer due to cold temperatures. Uribe next drinks a large glass of water due to kidney stones. This causes her to spend 15 to 20 minutes going to the bathroom. The grievant then needs 30 to 40 minutes to shower. The warm water is part of her therapy.

Uribe prepares her own breakfast eats, and needs another 60 to 75 minutes to groom and get dressed. She uses a bedpan during this process. to save time. Next, the grievant must do exercises' on a special machine (flexaciser") for 30 to 45 minutes as directed by her doctors to combat atrophy After spending another 20 to 25 minutes in the bathroom Uribe needs 5 to minutes to get in her van. Her drive takes 20 to 25 minutes and then she is ready to clock in for work at the Laboratory.

According to the grievant an 8:00 a.m or 9:00 a.m. start time means an assistant would have to come at 5:30 a.m or 6:00 a.m in the past Uribe has normally been able to have someone come from 8:00 a.m. to 11:00 a.m., but she has not been able to find anyone who can consistently arrive earlier. The grievant cannot rely on her mother who is now 83, for all the assistance she requires. Uribe also maintains if she wakes up too early, the colder temperatures increase the time and difficulty it takes to get ready due to

her medical condition. For these reasons, the Union argues an 8:00 a.m or 9:00 a.m. start time places an undue hardship on the grievant because of her disability

The Employer correctly contends the obligation under the ADA to provide a reasonable accommodation applies only to accommodations that are needed because of the disability. The EEOC Technical Assistance Manual at 111-4 provides:

> The reasonable accommodation obligation applies only to accommodations that reduce barriers to employment related to a person's disability; it does not apply to accommodate ions that a disabled person may request for some other reason (emphasis in original).

In this case the Employer argues the request for an accommodation purely personal and not related to her employment. The Employee claims her arduous routine at home is not materially affected by the starting time of her shift and that personal assistants are available at, any hour from private agencies. The Employer cites 15 requests by the grievant in 1996 to begin work earlier than 11:00 a.m. for reasons including doctor appointments and Union business. Because personal convenience is not job-related the Employer asserts the accommodation sought by Uribe is based on factors apart from the working environment and therefore falls beyond the reach of the ADA.

On balance, however, there is sufficient evidence in this case to establish a nexus between her disability and the

starting time of her shift. It is recognized the grievant is able to come to work before 11:00 a.m. and the doctor notes presented at arbitration citing older temperatures in the early morning do not alone supply compelling medical support for her request. Nor does her understandable preference to avoid the extra expense of hiring personal assistants through an agency serve as a valid basis for an accommodation. Nevertheless the reality remains her covered disability which confines her to a wheelchair and adversely affects her joints and muscles makes getting ready for work a long and arduous process is the primary cause for the hardship in starting work every day at 8:00 a.m. or 9:00 a.m. The extra hours and effort she needs to get ready are not required for individuals who do not have her medical disability. In light of the cumulative hardships which would enure from an early morning report time, the cushion of an 11:00 a.m. schedule is seen as warranted under the unique circumstances presented. Accordingly a prima facie case of discrimination is established in this case. The burden thus shifts to the Employer to show a reasonable accommodation is not available

The ADA does not require an accommodation which "would impose an undue hardship on the operation of the business of the covered entity." 42 U.S.C. §12112(b)(5)(A). Reasonable accommodation may include "job restructuring, part time or modified work schedule and other similar accommodations for individuals with disabilities. 42 U.S.C. §12111(9)(B). Undue hardship means generally "an action requiring significant difficulty or expense" when considered in light of the following factors:

(1) the nature and cost of the accommodation needed under this chapter;

(2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such. facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(3) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities;

(4) the type of operation or operations of the covered entity, including the compositions of the covered entity, including the composition, structure, and functions of the work force of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity; and

(5) the impact of the accommodation on the operation on the ability of other employees to perform their duties and the impact an the facility's ability to conduct business. 42 U.S.C. §12111(10)(B).

The Employer correctly contends the ADA does not require that a new shift be created for a disabled individual. Pattison v. Meijer, Inc., 4 AD Cases 997 (W.D.

Mich. 1995). An employer is also not required to make an accommodation which would create a new position, bump 'another employee, promote the disabled person, or violate the rights of another employee under a collective bargaining agreement. Id. at 999. Under this case authority, it is clear the ADA does not obligate the Employer to create a new shift merely to accommodate the grievant's disability.

But the ADA does provide that a reasonable accommodation include a modified work schedule. 42 U.S.C. §12111(9)(B). In case, the evidence demonstrates a modification of the grievant's work schedule by two hours from 9:00 a.m.-5:30 p.m. to 11:00 a.m.-7:30 p.m would not materially change her shift, bump another person, or violate the rights of any other member of the bargaining unit. The laboratory remains open until 7:30 p.m., there is supervision present, and other Cts are routinely permitted, albeit on a temporary basis, to remain until that hour to perform their regular duties. Quality Control Technologists and Lab Assistants are also present in the laboratory working regular schedules until 7:30 p.m. There is no showing allowing Uribe to work during those two hours after 5:30 p.m. would have any effect on the work of other employees or cause any material disruption in the facility.

The Employer asserts a change in Uribe's schedule by two hours would cause an undue hardship on the operation. Yet the Cytology Department at North Hollywood processes between 40,000 and 50,000 specimens every month. Most (85%-90%) are pap-smears. Flow charts indicate there are dozens of steps taken from collection of specimens by

physicians, packaging and storage, delivery to the lab, sorting labeling and data entry, preparation and distribution to Cts, reading by Cts, checking by quality control, review by a pathologist more data entry, until the appropriate release of results to physicians and patients Turnaround data shows 14 days in December 1996, 8 days in March 1997, and a steady increase to 14 days later in the year.

Specimens delivered to the North Hollywood facility remain at the location for several days. Once the slides are initially processed batches containing GYN and non-GYN specimens are delivered to Cts to be read for signs of pathology. All atypical and abnormal specimens identified by Cts must be reviewed by Quality Control and then a pathologist. For quality assurance purposes, about 10% of the normal specimens must also be reviewed by Quality Control. The results of the tests may then be released to the physicians and patients.

Beginning in 1995, the Employer has instituted a variety of changes to reduce turnaround for GYN specimens and critical non GYN specimens. One of those goals was to have all specimens handled by Cts to be released to providers the same day. The purpose of the schedule changes in January 1997 for Cts and other laboratory workers was to facilitate this goal. Management staggered the work hours of Cts and QC so that all slides read by Cts would have the chance of being reviewed and released the same day.

The record demonstrates, however, management has yet to -come close to realizing the goal of releasing all specimens the same they are processed by Cts for a variety of reasons. An increased volume of specimens without sufficient personnel to process those specimens has left a large segment of slides unprocessed by Cts every day. Data processing problems have contributed to the delays. Under existing procedures, slides completed by Cts after 5:00 p.m. are not able to be reviewed by Quality Control the same day. In addition, a high portion of the slides completed by Quality Control are not able to be reviewed by -a pathologist until the following day. Because state law prohibits Cts and QC personnel from reading more than 80 slides in any one day, there is little management can do to reach it same day goal without a major reduction in the volume of work or significant increase in staffing.

Assuming the grievant reads 10 slides per hour, a two hour change in her schedule would affect no more than 20 specimens a day. Give the large volume of specimens which presently do not get released the same day, it cannot be found a modification of her schedule would have any appreciable affect on the size of the backlog. The fact other CT are permitted at times to work until 7:30 p.m. underscores the reality of the goal of a one day turnaround from reading by Cts to release is no achievable in the foreseeable future. Accordingly, under all the circumstances, a finding an 11:00 a.m. start time for the grievant constitutes an undue hardship on the Employer within the meaning of the ADA cannot presently be established.

Having determined the Employer has been violating the ADA by no allowing Uribe to work a modified schedule from 11:00 a.m.-7:30 p.m. the discussion will turn to the appropriate remedy. The grievant was issued two warning letters on January 7, 1997 after management refuse to accommodate her request for a modified schedule because of he disability. From January 8, 1997 until May 1, 1997, her hours were restricted to 11:00 a.m.-4:30 p.m. daily while her request for a accommodation was being investigated and assessed by management Thereafter, she has worked a full schedule from 9:00 a.m.-5:30 p.m For remedy, Uribe should be permitted to work a modified schedule from 11:00 a.m.-7:30 p.m. effective immediately, be restored the straight time wages and any benefits lost between January 8, 1997, and May 1 1997, and have the two NDAs removed from her file. Because the remedy for the ADA violation encompasses the relief sought by the other two grievances at issue, there is no need to address the claims related to just cause or the violations of the labor agreement advanced by the Union in this proceeding.

In conclusion, a review of the entire record at arbitration demonstrates the Employer violated the ADA by not granting Uribe a modification of her schedule from 8:00 a.m.-4:30 P.m. or 9:00 a.m 5:30 p.m. to 11:00 a.m.-7:30 p.m. on balance, there was sufficient evidence to show the request for a later start time was based on the grievant's disability and the accommodation would not constitute an undue hardship on the Employer in light of the operations of the Cytology Department at the North Hollywood facility under the existent circumstances. The appropriate remedy

for this discrimination is determined. to be the modification of her schedule as requested, the restoration of wages and any benefits lost, and the removal of two NDAs from her file. An award consistent with these findings will follow.

## AWARD

1. The Employer has been violating the Americans with Disabilities Act ("ADA") by not allowing the grievant to have a modified schedule from 11:00 a.m. to 7:30 p.m.

2. For remedy, the grievant shall 1) be allowed to work a modified schedule from 11:00 a.m to 7:3.0 p.m. effective immediately, 2) be paid her straight time wages and any benefits lost between January 8, 1997 and May 1, 1997, and 3) have the two NDAs dated January 7, 1997 removed from her file.

DATED: March 9, 1998
Santa Monica, California

/s/ Fredric R. Horwitz
FREDRIC R. HOROWITZ, Arbitrator

APPENDIX "D" [Rule 14.1.(i)(vi)]

PETITIONER'S COMPLAINT FILED IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES ON DECEMBER 31, 1997*

FILED
December 31, 1997

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

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|---|---|
| LIZABETH URIBE<br>Plaintiff,<br>v.<br>SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a partnership, KAISER FOUNDATION HOSPITALS, a non profit corporation, KAISER FOUNDATION HEALTH PLAN, INC., a Corporation, KATHY SMITH, JEFFREY SHULKIN, and DOES 1 through 20 inclusive,<br>Defendants | ) Case No. BC 195299<br>) COMPLAINT FOR<br>) DAMAGES AS A RESULT<br>) OF HARASSMENT BASED<br>) UPON PHYSICAL<br>) DISABILITY AND<br>) RETALIATION FOR<br>) COMPLAINTS OF<br>)DEFENDANTS VIOLATION<br>) OF CALIFORNIA'S FAIR<br>) EMPLOYMENT AND<br>) HOUSING ACT<br>)[Gov.Code §§ 12940(a),(f),(g)<br>) (h)(l),(i),(k) and 12965(b)]<br>) |

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*. The complaint has been downloaded from an ASCI disc and reformatted to comply with the font and page size requirements set forth in Rule 33(b) of the Rules of the Supreme Court of the United States. Exhibits referred to in the complaint are also not included in this appendix.

COMES NOW PLAINTIFF LIZABETH URIBE (hereinafter "PLAINTIFF"), and for her cause of action against DEFENDANTS and each of them alleges as follows:

1. PLAINTIFF is now, and has at all times during the course of her employment by DEFENDANTS been a resident of the County of Los Angeles, State of California, and each of the events set forth herein took place within the County of Los Angeles, State of California.

2.PLAINTIFF is now, and has at all times during the course of employment by DEFENDANTS been physically disabled and required to use a wheelchair as a result of the effects of her prior affliction with poliomyelitis, and the current effects of what has become known as "post polio sequel".

3.PLAINTIFF is informed, and based upon such information believes that DEFENDANT SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP (hereinafter "THE MEDICAL GROUP") is now, and was a partnership organized for the purposes of facilitating the operation of various health care facilities within the County of Los Angeles, State of California as part of a joint venture with the remaining institutional DEFENDANTS named herein.

4.PLAINTIFF is informed, and based upon such information believes that DEFENDANT KAISER FOUNDATION HOSPITALS (hereinafter "KAISER FOUNDATION") is now, and was at all times herein

mentioned a non profit Corporation authorized and doing business within the State of California, County of Los Angeles in conjunction with the other institutional DEFENDANTS named herein.

5.PLAINTIFF is informed, and based upon such information believes that DEFENDANT KAISER FOUNDATION HEALTH PLAN, INC. (hereinafter "THE HEALTH PLAN") is now, and was at all times herein mentioned a corporation authorized and doing business within the State of California, County of Los Angeles in conjunction with the other institutional DEFENDANTS named herein.

6.PLAINTIFF is employed jointly by DEFENDANTS SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, KAISER FOUNDATION HOSPITALS and KAISER FOUNDATION HEALTH PLAN, INC. (hereinafter jointly referred to as "THE KAISER GROUP") as a cytotechnologist at THE KAISER GROUP'S North Hollywood Reference Laboratory.

7.PLAINTIFF is informed, and based upon such information believes that individual DEFENDANTS KATHY SMITH, JEFF SHULKIN, RAMAH BALIBER, and CAROLYN E. GOMEZ are individual residents of the County of Los Angeles, California who aided and abetted the management of THE KAISER GROUP in the harassment of PLAINTIFF in retaliation for her complaints of its violation of her rights under Government Code § 12940,

8.PLAINTIFF is ignorant of the true names and capacities of DEFENDANTS sued herein as DOES 1 through 20, inclusive, and therefore sues these DEFENDANTS by such fictitious names. PLAINTIFF will pray leave of this court to amend this complaint to allege the true names and capacities when ascertained.

9. PLAINTIFF is informed and believes, and thereon alleges, that each of the DEFENDANTS herein was, at all times relevant to this action, the agent, employee, representing partner, or joint venturer of the remaining DEFENDANTS and was acting within the course and scope of that relationship. PLAINTIFF is further informed and believes, and thereon alleges, that each of the DEFENDANTS herein gave consent to, ratified, and authorized the acts alleged herein to each of the remaining DEFENDANTS.

10. PLAINTIFF is informed, and based upon such information believe that DEFENDANTS are currently, and have at all times herein mentioned been aware of her physical disabilities and their individual and collective obligation not to harass or take steps to interfere with her ability to perform in the work place or take actions which make it more difficult to perform as a result of her physical disabilities and functional limitations.

11. The claims which are the subject matter of this action arise solely, and exclusively under the laws and constitution of the State of California, as set forth in Article I section 1 and the California Fair Employment Act

(California Government Code §§ 12900 et seq., hereinafter referred to as "FEHA").

12. Under the provisions of Government Code § 12940(a) it is illegal for any employer within the State of California:

> because of . . . physical disability . . . to discriminate against the person in compensation or in terms, conditions or privileges of employment.

13. Under California Government Code § 12940(f) it is an unlawful employment practice for an employer or person to:

> discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [Government Code § 12940] . . .

14. Under the provisions of Government Code § 12940(g) it is illegal for any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

15. Under the provisions of Government Code § 12940(h)(1) it is illegal for any employer, or any other person within the State of California:

> . . . because of physical disability . . . to harass an employee or applicant . . . if the

entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.

16. Under the provisions of California Government Code § 12940(i) DEFENDANTS, and each of them were at all times herein mentioned obligated to:

> . . . take all reasonable steps necessary to prevent discrimination and harassment from occurring.

17. Under the provisions of Government Code § 12940(k) it is illegal for any employer or any other entity within the State of California:

> . . . to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee . . .

## FIRST CAUSE OF ACTION

## FOR DAMAGES RESULTING FROM DEFENDANTS' VIOLATION OF GOVERNMENT CODE §§ 12940(f),(g),(h)(1) & (i)

18. PLAINTIFF incorporates by this reference all of the allegations contained in paragraphs 1 through 17 from above, and by this reference incorporates said allegations as part of this FIRST CAUSE OF ACTION.

19. At various times during 1996 PLAINTIFF made a series of complaints to her supervisor KATHY SMITH, and various other members of THE KAISER GROUP'S management, including individual DEFENDANTS JEFF SHULKIN, RAMAH BALIBER, CAROLYN E. GOMEZ and DOES 1 through 20 inclusive concerning their failure to take steps to accommodate her physical disability under the provisions of Government Code § 12940(k) and her problems in getting to work in the morning because of the rigors associated with getting dressed and handling other personal needs in the morning.

20. PLAINTIFF is informed, and based upon such information believes that at the time PLAINTIFF made her complaints to the individual DEFENDANTS named herein concerning their failure to comply with their obligations under Government Code § 12940(k) they were aware that through the years she had been able to deal with her physical disabilities, and perform her functions as a cytotechnologist because of flexible work schedules, and her ability to adapt to a late morning starting time.

21. PLAINTIFF is informed, and based upon such information believes that despite the fact that starting time of the shifts for cytotechnologist has no effect upon the volume of slides an individual is able to generate (that number being fixed by law), DEFENDANTS eliminated the 11:00 am to 7:30 pm shift to which PLAINTIFF had previously been assigned, while continuing to allow non-handicapped cytotechnologist to work overtime hours as late as 7:30 pm in order to pick up extra compensation.

22. PLAINTIFF is further informed, and based upon such information believes that as a result of her ongoing complaints about the threatened change of shifts, and her attempts to bring to DEFENDANTS' attentions the difficulties she was having, not only with the revised work hours, but with her ability to enter the reference laboratory and use necessary facilities which were not designed for use by wheel chair bound persons with limited strength, her concerns were largely ignored and she was subjected to disciplinary action in the form of retaliatory warnings and a thirty day suspension in October and November of 1997 because she was late to work as a result of her need to deal with her physical disability and personal needs before coming to work.

23. PLAINTIFF is informed, and based upon such information believes that DEFENDANTS were aware when they changed her work schedule in early 1997 that because of her physical disabilities, and the restrictions her physical disability placed upon her, that forcing her to get up three hours earlier in the morning would cause major disruptions in her ability to function.

24. PLAINTIFF is further informed, and based upon such information believes that DEFENDANTS' failure to make any attempt to accommodate her physical disabilities, and their ultimate imposition of sanctions against her when she was unable to fully adapt to the change in her work schedule, was a direct result of her prior complaints about their unwillingness to comply with Government Code § 12940(k) made during 1996.

25. PLAINTIFF is further informed, and based upon such information believes that each of the DEFENDANTS named herein, with knowledge of the hardships they were imposing upon PLAINTIFF as a result of her physical disability, aided and abetted the management of THE KAISER GROUP in the ongoing harassment of PLAINTIFF which they knew, or should have known was being pursued in violation of Government Code §§ 12940(a), (f), (h)(i), (i) and (k).

26. As a proximate result of the conduct of THE KAISER GROUP and the individual DEFENDANTS named herein in violation of Government Code §§ 12940(f), (g), (h)(1), (i) and (k) PLAINTIFF has suffered general damages (in excess of the jurisdictional threshold of this Court) resulting from the mental anguish and stress caused by the harassment to which she was subjected over the twelve months preceding the filing of the complaints with the California Department of Fair Employment and Housing pursuant to the provisions of Government Code § 12965 (copies of which are collectively attached hereto as Exhibit "A" and hereinafter referred to as "THE FEHA COMPLAINTS").

27. As a result of her filing of THE FEHA COMPLAINTS with the California Department of Fair Employment & Housing November 19, 1997, NOTICES OF CASE CLOSURE and PLAINTIFF'S right to sue, copies of which are attached hereto as Exhibit "B" were issued on November 29, 1997.

28. PLAINTIFF is informed, and based upon such information believes that all of the conduct of the management of THE KAISER GROUP referred to herein was pursued maliciously and oppressively in reckless disregard of the PLAINTIFF'S rights under the constitution, laws and statutes of the State of California, entitling PLAINTIFF to recover punitive or exemplary damages in such an amount in excess of $25,000.00 as the trier of fact in this action may deem appropriate.

29. This action has been commenced, and is being pursued by PLAINTIFF under the provisions of Government Code § 12965(b), as a result of which PLAINTIFF is entitled to recover an amount equal to all damages shown by proof at the time of trial plus reasonable attorney fees and costs incurred in pursuing his claims in this action.

WHEREFORE, PLAINTIFF prays judgment against DEFENDANTS, and each of them, as follows:

1. For general damages, in an amount in excess of the threshold for this Court's jurisdiction, according to proof;

2. For compensatory damages according to proof, including damages for the mental pain and anguish experienced by PLAINTIFF;

3. For special damages in a sum be determined at the time of trial herein;

5. For punitive damages in an amount appropriate to punish DEFENDANTS and deter others from engaging in similar misconduct;

6. For reasonable attorney's fees incurred by PLAINTIFF pursuant to Government Code § 12965(b);

7. For costs of suit incurred by PLAINTIFF; and

8. For such other and further relief as the court deems proper.

LAW OFFICES OF JEROME ZAMOS

By: /s/Jerome Zamos
Jerome Zamos, Attorneys for
LIZABETH URIBE

APPENDIX "E" [Rule 14.1.(i)(vi)]

PETITIONER'S COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ON JANUARY 21, 1997[7]

FILED
January 21, 1997
Office of the Clerk

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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|---|---|
| LIZABETH URIBE; and HOSPITAL AND SERVICE EMPLOYEES UNION, LOCAL 399, Plaintiffs, v. KAISER FOUNDATION HOSPITALS, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, Defendants, | ) Case No.97-0375 GB(Mcx) ) COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES [Americans with Disabilities Act, 43 USC §§ 12101, et seq.; and Labor Management Relations Act, 29 Usc § 185] |

1. This is an action brought by Plaintiffs against Defendant Kaiser for alleged violation of the American with Disabilities Act, 42 USC §§ 12101, et seq. and Labor

[7]. The complaint has optically scanned from a copy and reformatted to comply with the font and page size requirements set forth in Rule 33(b) of the Rules of the Supreme Court of the United States.

Management Relations Act, 29 USC 185. Plaintiff seeks injunctive relief, damages, attorneys' fees and costs.

2. Plaintiff Lizabeth Uribe is a laboratory technologist who has worked for Defendant Kaiser for over 15 years and is a member of the collective bargaining unit covered by the contract negotiated between Kaiser and Service Employees Union, Local 399, AFL-CIO (hereinafter "Union" or "Local 399). Plaintiff Uribe is wheelchair-bound and is disabled as defined under the Americans with Disabilities Act (hereinafter "ADA"). Ms. Uribe's disability requires that she receive assistance from another person to bathe, dress, and otherwise prepare for work each day. She drives herself to and from work using a vehicle equipped with a wheelchair lift and the entire process of preparing for and reporting to work requires approximately three hours each day.

3. The laboratory where Plaintiff is assigned operates from 4:30 a.m. until 7:30 p.m. Until January 6, 1997, Defendant Kaiser accommodated Plaintiff's condition by permitting her to work a shift from 11:00 a.m. until 7:30 p.m. However, beginning January 6, 1997, Plaintiff was notified that henceforth she would be required to work a shift beginning at 8:00 a.m. and ending at 4:30 p.m. It has proven impossible for Plaintiff to obtain the personal assistance she requires as early as 5:00 a.m. and she has already received two (2) notices of disciplinary action from Defendant for reporting late to work with a directive that subsequent notices would result in her termination.

4. The ADA's provisions for reasonable accommodations require a reasonable adjustment of Plaintiff's hours within the operational hours of the laboratory and if Defendant should not make such adjustment and continue on its present disciplinary course, Plaintiff will be terminated and will suffer irreparable harm through, inter alia, loss of essential income and loss of health insurance coverage. In light of her condition and handicap, i.e. she is wheelchair-bound, it is unlikely Plaintiff could find other employment if terminated by Defendant Kaiser.

I

FIRST CAUSE OF ACTION
(ADA 42 USC § 12101, et seq.)

5. Defendant Kaiser Foundation Hospitals, Southern California Permanente Medical Group (hereinafter "Kaiser"), incorporated under the laws of the State of California, is engaged in an industry affecting commerce, and is an employer and covered entity under the ADA §§ 12111(2) and (5).

6. Plaintiff Lizabeth Uribe is a licensed Cytotechnologist who has been employed by Defendant Kaiser for over 15 years and is a "qualified individual with a disability" as defined under ADA § 12111(8).

7. Plaintiff is a licensed Cytotechnologist and works at the Defendant's Sherman Way laboratory along with approximately other Cytotechnologist, 7. Quality Control Technologists, 11 Laboratory Assistants and 3 Cyto

Pro-Techs. Plaintiff is also qualified, and on occasion works as, a Quality Control Technologist.

8. Plaintiff suffers from the disability of polio. As a result of this disability, Plaintiff requires the aid of a personal assistant to bathe and dress in the morning as well as assistance in preparing food. Plaintiff drives her own vehicle to work but depends on an electrical wheelchair lift to enter and exit her vehicle. The entire process of preparing for and reporting to work requires approximately three hours.

9. Plaintiff has obtained this assistance in the past through the help of family, friends, or individuals hired by Plaintiff to assist her, who do so at a minimal cost; and the cost of obtaining such service from commercial entities, even if such service were available as early as 5:00 a.m., is prohibitive to Plaintiff.

10. After repeated requests by Plaintiff and after the filing of a grievance by the Union, on or about October 1995, the Defendant did accommodate Plaintiff Is disability by adjusting her work schedule to permit her to report to work at 11:00 a.m. and work until the lab closed at 7:30 p.m.

11. Between October and December 1996, the Defendant made some changes in the organization of the Sherman Way Lab, but the lab still operates- from 4:30 a.m. to 7:30 p.m. and still provides the same services to the Defendant's various medical facilities using the same

personnel.

12. On or about January 3, 1997, Plaintiff was informed that beginning January 6, 1997, the start time of her work shift would change from 11:00 a.m . to 8:00 p.m. and Plaintiff would not be permitted to work beyond 4:30 p.m.

13. To report at this new starting time, Plaintiff would have to obtain the aid of a personal assistant as early as 5:00 o'clock a.m. and she is unable to obtain such assistance at that time of the day.

14. On or about January 8, 1997, Plaintiff received two separate notices of disciplinary action, one for reporting to work late on January 6, 1997 and one for working beyond 4:30 p.m. on January 6, 1997.

15. These notices of disciplinary action further state that "any further incidence of tardiness or failure to follow policies and procedures may result in further disciplinary action up to and including termination".

16. Despite Plaintiff is representations to Kaiser that she cannot obtain the necessary assistance in order to report to work at 8:00 a.m., and despite requests by Ms. Uribe and the Union that Plaintiff's schedule be returned to the 11:00 a.m. starting time, Defendants have failed to agree to such a change and have indicated that further discipline would be imposed should Plaintiff not report at 8:00 a.m., on time, on any day after January 24, 1997.

17. Section 12112(a) of the ADA provides in pertinent part that:

> "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to. . . .discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment."

18. Subsection (b) of that same provision further provides:

> "As used in subsection (a) , the term "discriminate" includes:
>
> ...
>
> (5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;"

19. Plaintiff alleges that the Defendant's refusal to allow her to continue to commence work at 11:00 a.m. or some other reasonable time later than 8:00 a.m. constitutes a failure to make reasonable accommodations to her known physical limitations and that such accommodation in shift change could be made without undue hardship on the operation of the laboratory where Plaintiff works.

20. Kaiser's failure to make this reasonable accommodation by arranging a shift change constitutes unlawful discrimination under Section 12112 of the ADA.

## II
## SECOND CAUSE OF ACTION
## (Injunction in Aid of Arbitration)

21. Hospital and Service Employees Union, Local 399, is certified as the bargaining representative under the National Labor Relations Act for various classifications of employees employed by Defendant Kaiser, including Plaintiff Uribe's classification.

22. Plaintiff Local 399 and Defendant Kaiser have entered into a collective bargaining agreement, which agreement covers the job classification held by Plaintiff Uribe and which also includes the following non-discrimination clause:

> "ARTICLE XXIII - NONDISCRIMINATION
> "The Employer and the Union agree that no employee or applicant for employment shall be discriminated against with the implementation of this Agreement or any other terms and conditions of employment in regard to race, color, religion, age, sex, national origin,sexual orientation, physical or mental handicap or veteran status."

23. The collective bargaining agreement between Plaintiff Local 399 and Kaiser also contains a binding

grievance and arbitration procedure and Local 399 has filed a grievance on behalf of Plaintiff Uribe alleging Kaiser has violated, inter alia, the non-discrimination clause by its failure to reasonably accommodate Plaintiff Uribe's physical limitations.

24. In the normal course of events,completing the grievance steps called for in the contract, moving the matter to arbitration and scheduling an arbitration will take several months.

25. Despite the filing of this grievance, Plaintiffs are informed that Defendant intends to proceed with requiring Plaintiff Uribe to begin work at 8:00 a.m. and to continue disciplining her, up to and including discharge, should she be unable to report by 8:00 a.m.

26. If Defendant is permitted to proceed with continued discipline and discharge of the Plaintiff, such action will occur before this matter is addressed by an arbitrator to remedy the situation will be impaired and the effectiveness of the arbitration proceedings undermined.

27. Should Kaiser be permitted to proceed with the discharge of Plaintiff prior to arbitration, Plaintiff Uribe will suffer irreparable harm in that she will not only lose her exclusive source of income by which she supports herself but also will lose her health insurance benefits which accompany her employment and which are essential to her.

28. Public policy favors arbitration and absent injunction, the arbitration process in this case will be seriously undermined, -while on the other hand maintaining the status quo pending arbitration will avoid disastrous disruption of Plaintiff Is life while imposing relatively minor, if any, hardship on Kaiser.

29. Plaintiffs Local 399 and Uribe have no plain, speedy, or adequate remedy at law.

WHEREFORE, Plaintiffs request that the Court grant the following relief:

1. That the Court find that the Defendant's failure to Plaintiff Uribe a later starting time for work constitutes illegal discrimination under the ADA.

2. That this Court, upon consideration of this Complaint, the accompanying Points and Authorities, and supporting declarations and the exhibits filed herewith, issue a temporary restraining order and/or order to show cause prohibiting Defendant Kaiser from:

a. Imposing any work schedule upon Plaintiff Uribe other than an 11:00 a.m. -to 7:30 p.m.;

b. Taking any further disciplinary action against Plaintiff, including discharge, for reporting late to work for any work shift that is scheduled to begin prior to 11:00 a.m.

3. Damages according to proof.

4. That the Court award Plaintiff's costs of suit and attorneys fees incurred herein and that the court make an award of such other and further relief as appears just and proper.

DATED: January 21, 1997.

Respectfully submitted,
VAN BOURG, WEINBERG, ROGER & ROSENFELD

By /s/James Rutkowski
JAMES RUTKOWSKI
ALBERTO 0. TORRICO
Attorney for Plaintiffs

**APPENDIX "F" [Rule 14.1.(i)(i)]**
**SUPERIOR COURT ORDER**
**ENTERED OCTOBER 7, 1998**
**DISMISSING PETITIONER'S COMPLAINT BASED**
**UPON THE DOCTRINE OF RES JUDICATA**

**ORIGINAL FILED**
**OCT. 07, 1998**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**
**FOR THE COUNTY OF LOS ANGELES**

| | |
|---|---|
| LIZABETH URIBE<br>Plaintiff,<br>v.<br>SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a partnership, KAISER FOUNDATION HOSPITALS, a non profit corporation, KAISER FOUNDATION HEALTH PLAN, INC., a Corporation, KATHY SMITH, JEFFREY SHULKIN, and DOES 1 through 20 inclusive,<br>Defendants | Case No. BC 195299<br><br>Assigned to<br>Hon. Malcolm H. Mackey<br><br>~~[PROPOSED]~~ ORDER GRANTING MOTION TO DISMISS<br><br>Date: September 24, 1998<br>Time: 8:30 a.m.<br>Dept: 84 |

On September 24, 1998, this matter came on for hearing before this Court on its 8:30 a.m. calendar, the Honorable Malcolm H. Mackey presiding. The parties appeared and argued through counsel.

This Court, having read and considered the moving and responding papers and all arguments presented, and the matter having been duly heard,

IT IS HEREBY ORDERED:

Defendant's Motion to Dismiss Action, As Barred by Res Judicata is granted. This action is hereby dismissed with prejudice, and all claims arising out of the allegations contained in Plaintiff's Complaint are barred by res judicata.

Dated: Oct. 07, 1998

MALCOLM H. MACKEY
JUDGE OF THE LOS ANGELES
COUNTY SUPERIOR COURT

APPENDIX "G" [Rule 14.1.(i)(i)]

# COURT OF APPEAL, SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA DIVISION FIVE, ORDER AUGUST 24, 1999 DENYING PETITION FOR REHEARING

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 5

DATE: August 24, 1999

Jerome Zamos
21550 Oxnard St., Ste 300
Woodland Hills, CA 91367

Lizabeth Uribe
v.
Southern California Permanente
Medical Group, et al.,

B127338
Los Angeles County No. BC183619

THE COURT:

Petition for rehearing denied.

APPENDIX "H" [Rule 14.1.(i)(i)]
CALIFORNIA SUPREME COURT ORDER
ENTERED OCTOBER 20, 1999
DENYING PETITION FOR REVIEW

Second Appellate District, Division Five, No. B127338
S082055

IN THE SUPREME COURT OF CALIFORNIA

---

LIZABETH URIBE, Appellant

v.

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, Et al., Respondent

SUPREME COURT
FILED
OCT 20, 1999
Robert Wandruff, Clerk
DEPUTY

---

Appellant's petition for review is DENIED.

/s/ George
Chief Justice

APPENDIX "I" [Rule 14.1.(i)(i)]

## REMITTITUR TO THE LOS ANGELES COUNTY SUPERIOR COURT ISSUED NOVEMBER 22, 1999

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK
DIVISION: 5

Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012

Lizabeth Uribe
v.
Southern California Permanente
Medical Group, et al.,
B127338
Los Angeles County No. BC183619

***REMITTITUR***

I, Joseph A. Lane, Clerk of the Court of Appeal of the State of California, for the Second Appellate District, do hereby certify that the attached is a true and correct copy of the original order, opinion or decision entered in the above-entitled case on August 9, 1999 and that this order, opinion or decision has now become final.

Respondent to recover costs on appeal.

Witness my hand and the seal of the Court affixed at my office this

Nov 22, 1999
Joseph A. Lane, Clerk
by:_____
Deputy Clerk

## APPENDIX "J" [Rules 14.1.(f) & 14.1.(i)]
## CONSTITUTIONAL PROVISIONS, STATUTES & APPLICABLE RULES OF COURT

### ARTICLE III §§ 1 and 2 clause 1

Section 1. Judicial Power, Tenure and Compensation

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2, Clause 1. Jurisdiction of Courts:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different

States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

## ARTICLE IV § 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

## ARTICLE IV § 2

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

## ARTICLE VI clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

## Fifth Amendment

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## section 1 of the Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

## THE UNITED STATES CODE

## 28 U.S.C. § 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or

immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

## 28 U.S.C. § 1738

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

## 29 U.S.C. § 185(a)

**Suits by and against labor organizations**

**(a) Venue, amount, and citizenship**

**Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.**

## 42 U.S.C. § 12101

**§ 12101. Findings and purpose**

**(a) Findings**

**The Congress finds that–**

**(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;**

**(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and**

pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular

minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter–

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12102(2)(A)

As used in this chapter:

(2) Disability

The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

## FEDERAL RULES OF CIVIL PROCEDURE

### Rule 15(d)

**Rule 15. Amended and Supplemental Pleadings**

> (d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

## CALIFORNIA GOVERNMENT CODE SECTIONS

### Government Code §§ 12926(k) through 12926(m)

As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(k) "Physical disability" includes, but is not limited to, all of the following:

> (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits an individual's ability to participate in major life activities.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Being regarded as having or having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2).

(4) Being regarded as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

It is the intent of the Legislature that the definition of "physical disability" in this subdivision shall have the same meaning as the term "physical handicap" formerly defined by this subdivision and construed in American National Ins. Co. v. Fair Employment & Housing Com. (1982) 32 Cal. 3d

603. However, "physical disability" does not include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the Americans with Disabilities Act of 1990 (42 U.S.C., Sec. 12211). Additionally, for purposes of this part, the unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a physical disability.

(l) Notwithstanding subdivisions (i) and (k), if the definition of "disability" used in the Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (i) or (k), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (i) and (k).

(m) "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(n) "Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with

disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Government Code § 12940

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

(1) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee with a physical or mental

disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health and safety of others even with reasonable accommodations.

(2) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam era veterans.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any

person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of the person discriminated against.

(d) For any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex, or any intent to make that limitation, specification or discrimination. Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) [FN1] and the regulations adopted pursuant thereto, nothing in this subdivision shall prohibit any

employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

(e) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code, which prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(f) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(h) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to

employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) This subdivision is declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities.

(B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or

corporation not organized for private profit.

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.

(4) For other types of discrimination as enumerated in subdivision (a), an employer remains as defined in subdivision (c) of Section 12926.

(5) Nothing contained in this subdivision shall be construed to apply the definition of employer found in this subdivision to subdivision (a).

(i) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(j) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the

person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.

(k) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(l) Initial application of this section to discrimination by employers on the basis of mental disability shall be in accordance with the following schedule:

(1) Commencing January 1, 1993, for

employers with 25 or more employees, the state, and its municipalities and political subdivisions.

(2) Commencing July 26, 1994, for all other employers specified in paragraph (2) of the subdivision of Section 12926 that defines "employer."

Government Code § 12965

(a) In the case of failure to eliminate an unlawful practice under this part through conference, conciliation or persuasion, or in advance thereof if circumstances warrant, the director in his or her discretion may cause to be issued in the name of the department a written accusation. The accusation shall contain the name of the person, employer, labor organization or employment agency accused, which shall be known as the respondent, shall set forth the nature of the charges, shall be served upon the respondent together with a copy of the verified complaint, as amended, and shall require the respondent to answer the charges at a hearing.

For any complaint treated by the director as a group or class complaint for purposes of investigation, conciliation, and accusation pursuant to Section 12961, an accusation shall be issued, if at all, within two years after the filing of the complaint. For all other complaints, an accusation shall be issued, if at all, within one year after the filing of a complaint. If the director determines, pursuant to Section

12961, that a complaint investigated as a group or class complaint under Section 12961 is to be treated as a group or class complaint for purposes of conciliation and accusation as well, such determination shall be made and shall be communicated in writing within one year after the filing of the complaint to each person, employer, labor organization, employment agency, or public entity alleged in the complaint to have committed an unlawful practice.

(b) If an accusation is not issued within 150 days after the filing of a complaint, or if the department earlier determines that no accusation will issue, the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on his or her request, the right-to-sue notice. This notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization or employment agency named in the verified complaint within one year from the date of that notice. If the person claiming to be aggrieved does not request a right-to-sue notice, the department shall issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint. A city, county, or district attorney in a location having an enforcement unit established on or before March 1, 1991, pursuant to a local ordinance enacted for the purpose of prosecuting AIDS/HIV discrimination claims, acting on behalf of any person claiming to be aggrieved due to HIV/AIDS discrimination, may also bring a civil action under this part against the person, employer, labor organization, or employment agency named in the notice. The superior, municipal, and

justice courts of the State of California shall have jurisdiction of those actions, and the aggrieved person may file in any of these courts. Such an action may be brought in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are maintained and administered, or in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice, but if the defendant is not found within any of these counties an action may be brought within the county of defendant's residence or principal office. A copy of any complaint filed pursuant to this part shall be served on the principal offices of the department and of the commission. The remedy for failure to send a copy of a complaint is an order to do so. Those actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to be aggrieved where those persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants. In actions brought under this section, the court, in its discretion may award to the prevailing party reasonable attorney fees and costs except where such action is filed by a public agency or a public official, acting in an official capacity.

(c) (1) If an accusation or amended accusation includes a prayer either for damages for emotional injuries as a component of actual damages, or for administrative fines, or for both, the respondent may within 30 days after

service of the accusation or amended accusation, elect to transfer the proceedings to a court in lieu of a hearing pursuant to subdivision (a) by serving a written notice to that effect on the department, the commission, and the person claiming to be aggrieved. The commission shall prescribe the form and manner of giving written notice.

(2) No later than 30 days after the completion of service of the notice of election pursuant to paragraph (1), the department shall dismiss the accusation and shall, either itself or, at its election, through the Attorney General, file in the appropriate court an action in its own name on behalf of the person claiming to be aggrieved as the real party in interest. In this action, the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by his or her own counsel. Complaints filed pursuant to this section shall be filed in the appropriate superior, municipal, or justice court in any county in which unlawful practices are alleged to have been committed, in the county in which records relevant to the alleged unlawful practices are maintained and administered, or in the county in which the person claiming to be aggrieved would have worked or would have had access to public accommodation, but for the alleged

unlawful practices. If the defendant is not found in any of these counties, the action may be brought within the county of the defendant's residence or principal office. Those actions shall be assigned to the court's delay reduction program, or otherwise given priority for disposition by the court in which the action is filed.

(3) A court may grant as relief in any action filed pursuant to this subdivision any relief a court is empowered to grant in a civil action brought pursuant to subdivision (b), in addition to any other relief that, in the judgment of the court, will effectuate the purpose of this part.

(4) The department may amend an accusation to pray for either damages for emotional injury or for administrative fines, or both, provided that the amendment is made within 30 days of the issuance of the original accusation.